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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1028

MARVIN MANDEL, W. DALE HESS, HARRY W. RODGERS, III, WILLIAM A. RODGERS, IRVIN KOVENS AND ERNEST N. CORY, JR.,

Petitioners,

v.

EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT, COMPOSED OF CHIEF JUDGE CLEMENT F. HAYNSWORTH, JR. AND CIRCUIT JUDGES JOHN D. BUTZNER, JR., DONALD RUSSELL, H. EMORY WIDENER, JR., KENNETH K. HALL, JAMES DICKSON PHILLIPS, FRANCIS D. MURNAGHAN, AND JAMES M. SPROUSE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Pursuant to this Court's Rule 31(1), the petitioners move the Court as follows:

1. They move the Court for leave to file the petition for a writ of mandamus hereto attached. The issuance of such a writ by this Court is authorized by 28 U.S.C. § 1651(a).

2. They further request that an order and rule be entered directing all active Circuit Judges of the United States Court of Appeals for the Fourth Circuit, qualified to sit in this proceeding as an en banc tribunal, to show cause why a writ of mandamus should not be issued

against them in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief in the premises as may be just and appropriate.

Respectfully submitted,

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Respondents.

PETITION FOR WRIT OF MANDAMUS

The six petitioners in this proceeding request that an original writ of mandamus issue from this Court, in accordance with the prayer herein, directed to those active Circuit Judges of the United States Court of Appeals for the Fourth Circuit qualified to sit in this proceeding as an en banc tribunal: Chief Judge Clement F. Haynsworth, Jr. and Circuit Judges John D. Butzner, Jr., Donald Russell, H. Emory Widener, Jr., Kenneth K. Hall, James Dickson Phillips, Francis D. Murnaghan, and James M. Sprouse.

OPINIONS BELOW

On January 11, 1979, after consideration of the case by a three-judge panel, the Fourth Circuit issued an opinion and judgment vacating the judgments of conviction and remanding for a new trial. The opinion is reported at 591 F.2d 1347 and is reprinted at pages 17a through 67a in the appendix to the petition for certiorari being filed simultaneously herewith. The judgment of the court is also reprinted in the appendix to the petition for certiorari at page 16a, as well as in the appendix to this petition for writ of mandamus, p. 1a, *infra*.

On July 20, 1979, following a rehearing en banc, an equal division of the Fourth Circuit entered a per curiam order stating that the judgments of conviction "are affirmed by an equally divided court." That per curiam order, together with a dissenting opinion, is reported at 602 F.2d 653 and is reprinted at page 7a of the appendix to the petition for certiorari and in the appendix hereto, at page 3a, *infra*.

On November 1, 1979, upon consideration of the petitioners' petition for a further rehearing en banc, the enlarged Fourth Circuit, again by an equally divided vote, ordered that the petition be denied, "it appearing that fewer than a majority of them [the judges in regular active service] have voted for it". This order, which was accompanied by a dissenting opinion and a dissenting statement, has not yet been reported. The order and the dissenting remarks are reprinted at pages 1a through 5a in the appendix to the petition for certiorari. The order and dissenting remarks are also reprinted in the appendix hereto, pp. 12a-16a, *infra*.

JURISDICTION

The judgments and order relevant to this petition for writ of mandamus were entered on January 11, 1979, July 20, 1979, and November 1, 1979, respectively.

There are no filing time requirements with respect to a motion for leave to file a petition for writ of mandamus, or with respect to the petition itself, but this mandamus motion and petition are being filed simultaneously with a petition for writ of certiorari. On November 20, 1979, the Chief Justice signed an order extending the time for filing the petition for writ of certiorari to and including December 31, 1979.

The jurisdiction of this Court to issue an original writ of mandamus is invoked under 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED

1. Does an equal division of all active circuit judges of a federal court of appeals have power or jurisdiction to exercise any of the en banc rehearing powers conferred by 28 U.S.C. § 46(c) on the majority of active circuit judges of a circuit?

2. Does an equal division of the active circuit judges of a federal court of appeals have power to affirm judgments of conviction entered in a district court where those judgments have been previously vacated by majority action of a court panel and where the judgment entered on the panel decision has not been vacated by a majority of the active circuit judges?

3. On a federal criminal appeal, when a conviction has been vacated by a panel judgment, and rehearing en banc has been ordered without vacating the panel judgment, does an equal division upon rehearing en banc constitute an affirmance of the unvacated panel judgment or an affirmance of the vacated judgment of the district court?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 46(c):

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three

judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. The court in banc shall consist of all circuit judges in regular active service.

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28 U.S.C. § 1651(a):

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

This petition for a writ of mandamus requests that the writ issue from this Court directing all Circuit Judges of the Fourth Circuit who are in regular active service and who are qualified to sit in these proceedings (1) to vacate the en banc's per curiam order of July 20, 1979, to the extent that it purports, by an equally divided vote, to affirm the judgments of conviction entered by the District Court for the District of Maryland, and (2) to reaffirm and give effect to the prior panel judgment of January 11, 1979, that has never been vacated, reversed, altered or amended in any way by action of a majority of all the Circuit Judges of the Fourth Circuit in regular active service and qualified to sit.

The facts, circumstances and trial proceedings that led to the entry of the judgments of conviction are more fully set forth in the petition for certiorari filed simultaneously with this petition for mandamus. Suffice it here to say that those judgments, entered after an extended retrial before a jury, and after two weeks of jury deliberation, reflected the jury verdicts that the six co-defendants, petitioners herein, were guilty of various

charges of mail fraud (18 U.S.C. §1341) and of prohibited racketeering activity (18 U.S.C. §1961, *et seq.*). Severe jail sentences and fines were imposed. In addition, the District Court, acting pursuant to 18 U.S.C. §1963(a), ordered the forfeiture of the "full ownership interests" that some of the petitioners held in the Marlboro racetrack enterprise involved in their alleged "pattern of racketeering activity."

The judgments of conviction and the forfeiture order were entered by the District Court on October 7, 1977. The petitioners duly noted their appeals to the Fourth Circuit. The United States also took an appeal from the District Court's post-trial order that decreed judgments of acquittal on Count 23 of the indictment, the jury having returned verdicts of guilty thereon. Count 23 had alleged that three of the petitioners had engaged in a "pattern of racketeering activities" in the course of conducting the affairs of an enterprise known as Security Investment Company. All these appeals were consolidated for hearing and determination by the panel of the Fourth Circuit to which they were assigned.[1]

Thereafter ensued a sequence of appellate events that is both remarkable and unparalleled in the history of the federal judicial system. In sequential order, those events may be summarized as follows:

(1) On January 11, 1979, the three-judge panel, dividing 2 to 1, entered a lengthy opinion and a judgment that resolved three matters favorably to the petitioners, i.e., the judgments of acquittal on Count 23, the judgments of conviction on the other counts, and

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[1] The Fourth Circuit panel assigned to these appeals was composed of Circuit Judges Butzner, Russell and Widener. The majority opinion was written by Judge Widener, joined by Judge Russell. Judge Butzner wrote a dissenting opinion. 591 F.2d 1347.

the order of forfeiture. As stated in the formal judgment entered on that day, see p. 1a of the appendix hereto, the court ordered

> ". . . that the judgments of acquittal on Count 23 of the indictment are affirmed. The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded, consistent with the opinion of this Court."

The majority opinion dealt at some length, 591 F.2d at 1374-1376, with the Government's appeal from the judgments of acquittal on Count 23. Indeed, Judge Butzner's dissent made no mention of any disagreement with the disposition of that appeal by the majority. The court's judgment affirming the judgments of acquittal on Count 23 was thus unanimous. But the major portion of the majority opinion dealt with two propositions: (a) a rejection of petitioners' contention that their prosecution and conviction under the mail fraud statute constituted an unwarranted overextension of that statute and an impermissible federal intrusion into the political affairs of the State of Maryland (591 F.2d at 1357-64), and (b) a determination that the trial judge had committed at least three reversible errors in his instructions on the mail fraud counts and in his admission of certain hearsay testimony and a state code of ethics (591 F.2d at 1364-1374). Judge Butzner disagreed only with proposition (b).

As to the order of forfeiture, the majority opinion merely stated that since the judgments of conviction on the various counts other than Count 23 were vacated and remanded for a new trial, it "follows" that the order of forfeiture must also be vacated and remanded (591 F.2d at 1376). Judge Butzner's dissent made no mention of the forfeiture order.

The disposition of petitioners' appeals for reversible trial errors made it unnecessary for the panel majority to address or resolve numerous other constitutional, statutory and procedural issues raised on the appeals. Left untouched, for example, were serious questions raised as to the construction and application of the anti-racketeering statute with respect to those who are not connected with organized crime operations, as well as serious questions about the constitutionality of the "forfeiture of estate" mandated by § 1963(a) of that statute.

(2) The January 11th opinion and judgment of the court have never been vacated, withdrawn, altered or otherwise rendered ineffective, in whole or in part. No order to that effect has ever been entered by the Fourth Circuit, sitting either as a panel or en banc. For all intents and purposes, the court's judgment of January 11th remains in existence to this day, awaiting appropriate execution.

(3) On February 23, 1979, the Government timely filed a petition for rehearing, with a suggestion of rehearing en banc. The Government carefully directed its petition for rehearing only to those portions of the panel's judgment and opinion that dealt with the reversible errors committed with respect to the jury instructions and the admission of evidence. No rehearing was sought as to the panel's determinations that (a) affirmed the judgments of acquittal on Count 23,[2] or (b) vacated the order of forfeiture. Moreover, the Government did not seek rehearing or further hearing of any of the arguments of petitioners that had been rejected or that had not been reached by the panel. Some of those

[2] Since the Government did not seek rehearing of that portion of the January 11 judgment that affirmed the judgments of acquittal on Count 23, and since the Government did not seek certiorari therefrom, that portion of the judgment is final.

unresolved issues, as Circuit Judge Widener was later to point out, "may present possible grounds for reversal." See 602 F.2d at 657.

Thus the Government did not construct its petition for rehearing so as to open all the original appeals to *de novo* consideration. It sought rehearing only as to those jury instruction and evidentiary matters that the panel found were impregnated with reversible error. Indeed, the Government persisted throughout the rehearing proceedings in its limited view as to the issues open for reconsideration. The Government filed no further brief before the en banc tribunal, preferring to rest its case on its objections to the jury instruction and evidentiary rulings as expressed in its petition for rehearing. Nor did the Government present any oral argument on other issues.

(4) On April 16, 1979, after having requested the petitioners to file a response to the petition, the Fourth Circuit entered an order granting rehearing en banc. This order did not vacate the panel judgment entered on January 11. And the order did not purport to restore the appeals on the docket as if they were pending and unresolved appeals.[3]

(5) On June 5, 1979, oral argument on the rehearing was had before six judges of the Fourth Circuit in regular active service. The total number of Circuit Judges in regular active service at this time was seven, but one of them (Circuit Judge Winter) had disqualified

[3] In its entirety, the April 16 order reads as follows:

"The appellee's petition for rehearing and suggestion for rehearing en banc, along with the response to the petition have been submitted to the court. Upon a poll, a majority of the judges eligible to vote, voted to grant rehearing en banc,

"IT IS, therefore, ORDERED that rehearing en banc is hereby granted.

"IT IS FURTHER ORDERED that the above cases will be reheard at the June 1979 Session."

himself from participating in these cases. Moreover, while Congress had earlier authorized three additional Circuit Judges for the Fourth Circuit (Public Law 95-486, 92 Stat. 1629), raising the total of regular active judges to ten, none of the three had taken places on the bench at the time of the oral argument. Thus the en banc rehearing was heard and determined by Chief Judge Haynsworth and Circuit Judges Butzner, Russell, Widener, Hall and Phillips.

The oral argument was devoted solely to the narrow issues raised in the Government's petition for rehearing, although the petitioners had filed a supplemental brief on the rehearing that argued that the judgments of conviction could not be reached without addressing and resolving the various other issues raised by petitioners on their original appeals.

(6) On July 20, 1979, an equal division of the six-judge en banc Fourth Circuit rendered the following per curiam order (602 F.2d 653):

> "The judgments of conviction are affirmed by an equally divided court.
>
> "A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.
>
> "AFFIRMED"

The per curiam order made no reference whatever to the January 11th judgment of the panel, and did not purport to vacate or withdraw that judgment or the opinion that accompanied it. The judgment that accompanied the per curiam order routinely stated, without reference to the en banc nature of the proceedings, that it is "here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed." Like the per curiam order, the

judgment made no reference to the earlier judgment of the panel. See appendix hereto, page 2a, *infra*.

Circuit Judge Widener, joined by Circuit Judge Russell, filed a dissenting opinion, indicating that "the lack of a bribery instruction for the mail fraud counts" was the point on which there was equal division. The identity of the other judge who voted with Judges Widener and Russell to make the equal division was not revealed by the court.

The per curiam order does state that a "majority of the members of the *en banc* court would affirm the judgments of conviction against all of the claims of the appellants" except the claim of error on which there was equal division. Presumably, that majority consisted of four of the six Circuit Judges participating in the en banc rehearing. But it is unclear whether this ruling against "all of the contentions of the appellants" was meant to apply only to contentions raised with respect to the limited issues in the Government's petition for rehearing, or whether it reflects a resolution of all contentions made as to all issues raised by petitioners on their original appeals. Those latter issues, of course, were not within the scope of the rehearing petition, and they were not reargued by the Government on the rehearing.

(7) On August 3, 1979, the petitioners filed a "Petition for Rehearing With Suggestion for Rehearing Before Fully Constituted Court In Banc." This petition was addressed to an en banc court that by now had a full complement of nine active judges. Shortly after the issuance of the July 20 per curiam order, two of the three newly authorized additional judgeships were filled by Circuit Judges Murnaghan and Sprouse. But with Circuit Judge Winter still disqualified, the qualified number of active judges on the Fourth Circuit, at the time this petition for further rehearing en banc was under consideration, was eight.

Petitioners addressed their rehearing request to various jurisdictional, statutory and practical objections to the equally divided en banc order of July 20th. Just as the Government's petition had been limited to the narrow issues resolved in the panel decision of January 11th, this petition was confined to an analysis of the procedural defects adhering to the cryptic and summary en banc order of July 20th. No attempt was made to reargue the merits of any issue that may have been involved in the July 20th order, although it was suggested that the addition of two new circuit judges might break the deadlock and thus warrant rehearing of the entire case.

In the response requested by the Fourth Circuit, the Government argued that there had been no violations of the en banc statute, § 46(c), and that petitioners "have had more than the adequate review of their contentions." Response, p. 7.

(8) On November 1, 1979, the petitioners' request for a further rehearing en banc was denied. The order merely stated that each of the judges in regular active service who was not disqualified had been polled, and that fewer than a majority of them had voted for it. See p. 12a of the appendix hereto. In denying the request for further rehearing, the Fourth Circuit was again divided equally, this time 4-4, and the November 1st order, the same as the July 20th order and judgment, was entered by an equal division of the Court. See Judge Murnaghan's remark in his dissenting "statement" that "four of my colleagues disagree with me". Appendix hereto, p. 13a, *infra*.

Circuit Judge Widener, joined again by Circuit Judge Russell, filed a dissent. They protested the practice of sending criminal defendants to jail by the vote of an equally divided vote, especially "when the means for getting a majority one way or the other is readily

available to the court." See p. 16a of the appendix hereto. The means referred to by Judge Widener are found in the dissenting "statement" of one of the new circuit judges, Judge Murnaghan. In that "statement," Judge Murnaghan offered to recuse himself from participating in any further rehearing of this case en banc. See pp. 13a-15a of the appendix hereto. On an eight-judge en banc court, such a recusal would mean that an odd number of active judges could participate. Presumably, Judge Murnaghan's offer of recusal was rejected by four of the judges of the Fourth Circuit.

REASONS FOR GRANTING WRIT

This case is both unique and important. Never before in the annals of the federal judiciary has less than a majority of participating judges sought to exercise affirmative judicial power. Never before has an equal division of active circuit judges usurped judicial power by rendering a judgment totally inconsistent with a valid panel judgment entered earlier and never vacated or withdrawn. If such unauthorized action by less than a majority of judges is left uncorrected, a most dangerous precedent will have been created. The whole notion of majority rule, so important to the effective functioning of a multi-judge appellate court system, will have been imperiled.

The importance of this case should be obvious. It is important in terms of the proper administration of the statute governing en banc rehearings, 28 U.S.C. § 46(c). And it is important to the six petitioners involved, who face severe losses of liberty and property as a result of this usurpation of power by those constituting less than a majority of active circuit judges.

En banc courts play a limited but extremely significant role in the federal judicial system. In the last five fiscal years, approximately three hundred oral hearings

before the federal courts of appeals were held en banc.[4] An appreciable but indeterminate number of those en banc hearings resulted in equal divisions, a possibility that exists whenever an even number of active judges sit en banc.

But those three hundred en banc proceedings have an importance beyond their arithmetical numbers. Like the instant proceeding, each of them is by definition a projection of the extraordinary circumstances and exceptionally important issues that justify invocation of the en banc procedure. *United States v. American-Foreign SS. Corp.*, 363 U.S. 685, 689 (1960). Thus any abuse of the en banc power necessarily affects the important case in which it arises, as well as the parties involved in such exceptional litigation.[5] An uncorrected abuse can have untold repercussions upon future en banc situations involving other issues deemed critically important.

In terms of the importance of en banc action to the individuals involved, the procedure employed in this instance by the Fourth Circuit can only be described as

[4] The Annual Reports of the Director of the Administrative Office of the United States Courts show the following fiscal year statistics as to en banc hearings in the courts of appeals:

Fiscal Year	En banc Hearings	4th Circuit En Bancs
1978	61	2
1977	48	11
1976	54	5
1975	54	7
1974	81	5
	298	30

[5] In *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 624 (1974), the Court accepted and answered the certified question as to en banc procedure not only because of the intrinsic importance of that question, but also because of the importance of the problem "to the parties in the two cases pending in the Fourth Circuit."

cruel and unusual appellate justice. The six petitioners have witnessed the entry of a valid appellate judgment vacating their mail fraud and racketeering judgments of conviction. That judgment still stands, unvacated and unaltered in any way. Yet they have seen that seeming rectification of an unfair trial snatched away by an incredible 3-3 tie vote of all qualified active circuit judges. And their efforts to secure a reconsideration and breaking of that tie vote have foundered on the shoals of an even more incredible tie vote, this one 4-4.

As Mr. Justice Rehnquist has said, in his memorandum in *Laird v. Tatum*, 409 U.S. 824, 838 (1972), any affirmance by an equally divided Court is "unsatisfactory enough in a single case." When that single case is a criminal case, however, it becomes intolerable to rest the appellate assessment of the propriety of a conviction upon an equally divided vote. Society is taking one of "its most awesome steps" when it deprives "one of its members of his life, liberty or property." *Coppedge v. United States*, 369 U.S. 438, 449 (1962). When society decides to subject that deprivation to the appellate review process, that process should be meaningful. But a judicial stalemate, which means a total inability to review or assess the propriety of a conviction, is the antithesis of a meaningful appellate process. See, *Neil v. Biggers*, 409 U.S. 188, 190-2 (1972). It is an abdication, in the most unacceptable context, of "the task of a Court of Appeals to reconcile its internal difficulties . . . [and] to decide all properly presented cases coming before it . . ." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

This breakdown in appellate justice cries out for review and correction by this Court.

I. THE ISSUANCE OF A WRIT OF MANDAMUS IS NECESSARY TO INSURE THAT COURTS OF APPEALS OBSERVE THE "FUNDAMENTAL REQUIREMENTS" OF THE EN BANC STATUTE, 28 U.S.C. § 46(c).

It is both appropriate and necessary to issue a writ of mandamus in aid of this Court's responsibility to supervise the proper administration of the en banc statute, 28 U.S.C. § 46(c).

In *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 624-625 (1974), the Court reiterated the ruling in the *Western Pacific Railroad Case*, 345 U.S. 247, 250, 259 (1953), that § 46(c) is "a grant of power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing." The right of a litigant, in other words, goes "no further than the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 5 (1963).

Section 46(c) allows courts of appeals a vast amount of discretion in setting up administrative machinery for executing the en banc power. But the writ of mandamus here sought does not seek to control or interfere with such discretion. Rather the mandamus request seeks to confine the exercise of en banc power by the Fourth Circuit within the bounds set by § 46(c). That is a matter of judicial power, not of a litigant's right.

As the Court observed in *Western Pacific*, at 260, "If § 46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals." And in the exercise of the Court's general power to supervise the administration of justice in the federal courts, including the administration of en

banc justice, "the responsibility lies with this Court to define those requirements and insure their observance." *Ibid.*

Thus when a serious problem arises as to whether a court of appeals has observed all these "fundamental requirements" of § 46(c), the issue is not one of inquiring into the exercise of judicial discretion or into the possible violation of a litigant's right. It is an exercise in delineating and enforcing those fundamental judicial requirements, requirements that reflect the content and extent of the statutory commitment of "the *en banc* power to the majority of active circuit judges." *Western Pacific,* at 261. Matters of judicial power, like matters of jurisdiction, must be assessed in absolutist terms. That is why mandamus is so well suited to making such an assessment.

In the past, the Court on occasion has used certiorari as a vehicle for supervising the administration of the en banc requirements of § 46(c). Thus in *Western Pacific,* at 250, certiorari was granted because "we deemed it important to resolve the *en banc* questions precipitated by this litigation." The Court has also exercised such supervision by answering a certified question about the administration of § 46(c) from a court of appeals, a question that was deemed important "to the administration of judicial business in the circuits, as well as to the parties in the two cases pending in the Fourth Circuit." *Moody v. Albemarle Paper Co., supra,* 624. But because the "fundamental requirements" of § 46(c) are so divorced from the rights of litigants and are so exclusively matters of judicial power, petitioners here suggest that the writ of mandamus may be the most appropriate procedure to test whether the equal division of the active Fourth Circuit judges have exceeded their en banc powers.

Should this Court feel, however, that mandamus is not an appropriate proceeding for addressing the en banc problem in this case, petitioners suggest that this petition for writ of mandamus be treated as a petition for certiorari. Review of the en banc problem should then be granted on that basis. See, e.g., *Collier v. United States*, 382 U.S. 890 (1965).

II. THE EXCEPTIONAL CIRCUMSTANCES IN THIS CASE JUSTIFY INVOCATION OF THIS COURT'S POWER UNDER 28 U.S.C. § 1651(a) TO ISSUE AN ORIGINAL WRIT OF MANDAMUS.

The issuance of an original writ of mandamus, under the circumstances, comes squarely within the jurisdictional corners of the All Writs Statute, 28 U.S.C. § 1651(a). The prime and traditional justification for issuing mandamus pursuant to § 1651(a) has always been "to confine an inferior [federal] court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967), quoting from *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). In this case, mandamus is sought to confine the en banc Fourth Circuit, or at least an equal division thereof, to a lawful exercise of the en banc judicial power conferred by § 46(c).

As developed more fully hereinafter, mandamus is sought on the premise that § 46(c) confers no affirmative judicial power on an equal division of active circuit judges. That section confers such power only on a majority of the active judges. Anything less than a majority, whether it be an equal division or a minority, has no judicial power (a) to ignore or vacate an outstanding prior judgment of a panel of the court, or (b) to affirm or reinstate judgments of conviction that stand vacated by the terms of that prior panel judgment.

Thus in the context of an en banc rehearing of an unvacated panel judgment, an equal division of active judges can do no more than affirm the panel judgment that is before it for reconsideration. Any attempt by the equal division to do more constitutes what the *Will* and *Roche* decisions describe as a judicial "usurpation of power." Such usurpation is the historic reason for issuing a writ of mandamus.

Moreover, issuance of a mandamus writ in this instance would fully satisfy the § 1651(a) requirement that such issuance be in aid of this Court's appellate jurisdiction. Its issuance, in other words, would be "in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *Ex parte United States*, 287 U.S. 241, 246 (1932). The unauthorized action of the equal division of the en banc court in affirming the judgments of conviction rather than the prior unvacated judgment of the panel has effectively defeated this Court's appellate jurisdiction over that panel judgment. The panel's lengthy opinion accompanying that judgment, dated January 11, 1979, has been fully reported at 591 F.2d 1341.

A more complete destruction of this Court's jurisdiction to review that panel decision of January 11th would be difficult to imagine. Had the en banc court acknowledged that the panel decision has never been vacated and that the rehearing thereof had failed by an equally divided vote, this Court's jurisdiction to review that decision on certiorari would have remained intact. The Court, on petition by the Government, could have reviewed the judgments of conviction in light of the various reversible errors articulated in the panel's opinion.

Since the panel's judgment of January 11th has not been vacated or withdrawn, in whole or in part, it remains subject to certiorari review. But review is hindered unless and until the equally divided en banc judgment of July 20, 1979, is declared void as a "usurpation of power." That July 20th order, which carries with it no explanatory opinion, purports to dislodge and replace the otherwise reviewable panel judgment of January 11. But the reviewability of that July 20th order is no substitute for review of the January 11th judgment. The two judgments cover different matters, and while one is accompanied by a written opinion, the other is not. Regardless of how reviewable the July 20th order may be, moreover, its very entry interferes with review by this Court of the panel judgment of January 11th. Mandamus is designed to remove and invalidate such unauthorized action.

There can be no question that mandamus is not here sought as a substitute for some other available mode of review of the panel judgment and opinion of January 11th. See, *Ex parte Fahey,* 332 U.S. 258, 259-60 (1947); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 384-85 (1953). A writ of mandamus in these circumstances would be in aid of this Court's jurisdiction to review the January 11th decision.

This Court has often said that the remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976). This is an extraordinary situation. An equal division of an en banc court has sought to exercise judicial powers that § 46(c) commits only to a majority of the active circuit judges. This attempted "usurpation of power" demands "drastic" correction by way of mandamus.

III. IMPORTANT AND UNIQUE PROBLEMS IN THE ADMINISTRATION OF THE EN BANC REHEARING PROCEDURE, AUTHORIZED BY 28 U.S.C. § 46(c), ARE PRESENTED BY THIS CASE.

Several important questions emerge from the per curiam order of July 20, 1979, wherein the judgments of conviction entered in the District Court were affirmed "by an equally divided court." Those questions reflect some of the "fundamental requirements" of the en banc statute, 28 U.S.C. § 46(c), requirements that depend upon this Court for ultimate delineation and enforcement. *Western Pacific Railroad Case,* 345 U.S. at 260.

At the outset, it must be remembered that the panel decision of January 11th was in legal and statutory effect the decision of the Fourth Circuit. Under 28 U.S.C. § 46(c), most cases are heard and determined "by a court or panel of not more than three judges." And when a court of appeals does sit as a panel or division of three judges, "the division [or panel] constituted the court" for purposes of hearing and deciding the appeal. *Bradley Mining Co. v. Boice,* 205 F.2d 937, 938 (9th Cir. 1953).

In asking the questions about the propriety of the en banc order of July 20th, one must keep in mind that the July 20th affirmance of the judgments of conviction was made with full knowledge and awareness by the Fourth Circuit that on January 11th the court, sitting as a panel of three judges, had vacated those very same judgments of conviction. The July 20th action was taken with the further knowledge and awareness that the January 11th judgment of "the court" had in no way been vacated, withdrawn or altered by "the court." There was no order of "the court," and no rule promulgated by the Fourth Circuit, that had the effect of automatically vacating or withdrawing the January 11th judgment of "the court" upon the grant of rehearing en banc.

In that context, the following questions of judicial power arise from the July 20th en banc action:

1. *Does § 46(c) commit any kind of en banc rehearing power to an equally divided en banc court?* The answer to that question must be "no," for the en banc power conferred by § 46(c) is committed only "to the majority of active circuit judges." *Western Pacific,* at 247. As Judge Maris once wrote, in language quoted with approval by the Court in *United States v. American-Foreign SS. Corp.,* 363 U.S. at 689-90, the main purpose of § 46(c) is to enable a court of appeals "to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions." Maris, *Hearing and Rehearing Cases in Banc,* 14 F.R.D. 91, 96 (1954).

Hence any group of active circuit judges constituting less than a majority can execute none of the en banc rehearing powers expressed in § 46(c). By themselves or in an evenly divided group, less than a majority of the judges cannot effectuate a rehearing en banc, vacate or overturn a prior judgment of "the court," or enter a judgment inconsistent with that previously reached by "the court." They are not charged, in other words, with the § 46(c) duties relative to "the administration and development of the law of the circuit." *United States v. American-Foreign SS. Corp., supra,* at 689. To the extent the July 20th en banc order reflects an effort to perform such duties or to achieve such results, it must be considered a usurpation of judicial power and hence void.

2. *What judicial action can an evenly divided court then take with respect to rehearing en banc a prior determination of the court?* Since such a division has no judicial power to effectuate a rehearing en banc, the division can only act so as to indicate that the purpose

of the rehearing has failed, and that the prior judgment as to which rehearing was sought must be summarily affirmed. In the present case, in failing to recognize that they had no judicial power to affect the unvacated panel judgment, the equal division of the Fourth Circuit placed itself squarely in conflict with the holding of the Court of Appeals for the District of Columbia Circuit in *Bulluck v. Washington*, 468 F.2d 1096, 1122 (1972).

In *Bulluck*, as in this case, a court of appeals granted en banc rehearing without vacating the panel judgment. The en banc court, finding itself equally divided after the rehearing, recognized that the equal division was powerless to affect the panel judgment and that the only proper course was for the order granting rehearing to be set aside. In so doing, the court stated:

> "The Court is equally divided as to whether the judgment of the District Court should be affirmed. The order of March 7, 1972, granting rehearing en banc, did not vacate the judgment of the division entered January 19, 1972, and the opinions filed that date. Any action of the Court en banc can neither affect the judgment of affirmance, nor provide an authoritative exposition of pertinent legal doctrine. Accordingly, it is
>
> "Ordered by the Court en banc that the order of March 7, 1972 granting rehearing en banc is hereby vacated, and the judgment of affirmance entered January 19, 1972, by the division remains in effect." 468 F.2d at 1122.

The holding in *Bulluck*, moreover, is in accord with the rule of *Carmichael v. Eberle*, 177 U.S. 63, 66 (1900), where it was indicated that when a territorial court divided equally after hearing oral argument on a petition for rehearing, the equal division was tantamount to a denial of the rehearing.

3. *Why does not the equally divided en banc order of July 20th constitute, as it states, an affirmance of the*

judgments of conviction entered in the court below? The July 20th order to that effect reflects a basic confusion between hearings en banc and rehearings en banc, both of which are encompassed by § 46(c). Where the original hearing of an appeal is en banc, the judgment under review is that of the court below. Under such circumstances, as this Court said long ago in *Durant v. Essex Co.*, 7 Wall. 107, 112 (1869), "If the judges are divided, the reversal cannot be had, for no order can be made . . . The judgment of the court below, therefore, stands in full force."

But a rehearing en banc is addressed not to a judgment of the court below but to a prior judgment rendered by the appellate court itself. Unless and until that prior appellate judgment is somehow vacated or removed, the en banc rehearing tribunal can never address the judgment of the court below. An equal division on rehearing en banc of a prior and unvacated appellate judgment can only mean, in the words of *Durant v. Essex Co.*, that reversal of that prior appellate judgment cannot be had and that such a judgment therefore "stands in full force."

The Fourth Circuit's order of July 20th is patently based on the rule in *Durant v. Essex Co.* respecting original hearings en banc. To cover rehearings en banc, the rule must be restated to provide that the last extant judgment undergoing en banc rehearing cannot be reversed on an equal division; that judgment then "stands in full force." If that extant judgment happens to be a judgment rendered by a panel of the appellate court, then the equal division must result in an affirmance of that judgment.

As thus restated, the rule announced in *Durant v. Essex Co.* was patently violated in the entry of the July 20th en banc order. The equally divided court simply ignored the only extant judgment before it on rehearing

en banc, the judgment of the court panel rendered on January 11th. It assumed, incorrectly, that the judgments of conviction entered in the District Court were before it, as if this were an original hearing en banc of petitioners' appeals from those judgments of conviction. Nothing in § 46(c) permits such a cavalier readjustment and reordering of the subject matters involved in the rehearing en banc.

4. *Does the action of a majority of active circuit judges in granting a rehearing en banc constitute a withdrawal or vacation of the prior court judgment as to which rehearing is sought?* By itself, such an order granting rehearing en banc means only what it says, i.e., that a rehearing of a specified judgment will be had en banc. Nothing in § 46(c) compels any conclusion or implication that the specified judgment is thereby vacated, or that the case is restored to the argument calendar as though it were to be heard originally en banc.

The rules and practices adopted in certain other Circuits that have confronted this problem are confirmatory of the impotency of a mere order granting rehearing en banc to achieve a withdrawal of the court order to be reheard en banc. Four Circuits have adopted and published, by majority vote, local rules or operating procedures whereby the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the court and to restore the case on the docket as an original appeal pending before the en banc courts.[6] These local rules have a two-fold effect. The first is to cause the judges of those circuits to vote for rehearing

[6] The Third, Fifth, Sixth and Seventh Circuits have adopted such rules or practices: Third Circuit Internal Operating Procedures, Part O(3)(f), and see Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 95 (1953); Fifth Circuit Rule 17; Sixth Circuit Rule 14(a); Seventh Circuit, Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1979 ed.), p. 48.

only in those cases in which they determine, in the first instance, that the panel judgment must be set aside.[7] The second is to discharge the obligation of the circuit, with respect to its en banc procedure, that, "whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pacific,* at 268.

In the majority of the circuits there are no such local rules. In two of these Circuits the courts have either, as in *Bulluck,* permitted unvacated panel judgments to remain or, on a case-by-case basis, they have entered separate orders to vacate panel judgments either simultaneously with, or subsequent to, the entry of the orders granting rehearing en banc.[8]

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[7] Prior to its adoption of Rule 17, the Fifth Circuit's practice was to await the outcome of the en banc rehearing and if the result was to reverse the prior panel ruling, then to enter an order vacating and overruling the panel judgment and to address directly the judgment of the lower court. See, *Weissinger v. United States,* 423 F.2d 795, 796 (5th Cir. 1970).

[8] The two Circuits that have followed this practice are the District of Columbia Circuit and the Second Circuit. See, e.g., *Bulluck v. Washington,* 468 F.2d 1096 (D.C. Cir. 1972); *Drake Bakeries, Inc. v. Local 50, etc.,* 294 F.2d 399 (2d Cir. 1961), rev'd on other grounds, 370 U.S. 254 (1962); *American-Foreign SS. Corp. v. United States,* 265 F.2d 136, 144 (2d Cir. 1958). This was also the practice of the Fifth Circuit prior to the adoption of its Rule 17. See footnote 7, *supra.*

In the *Drake Bakeries* case, *supra,* the Second Circuit divided equally on rehearing the case en banc. To effectuate an affirmance of the district court's order, one of the three judges who voted to reverse the district court changed his vote to produce a 4-2 vote to withdraw the panel decision. This matter was one of the questions presented to this Court in the ensuing petition for certiorari, i.e., whether the even division of the active judges upon rehearing en banc affirmed the panel decision or the district court decision. *Drake Bakeries, Inc. v. Local 50,* 368 U.S. 975 (1962), petition for certiorari, p. 2. But after certiorari was granted on this and another point, petitioner abandoned the en banc point and neither briefed nor argued it. 370 U.S. 254, 255, n.1 (1962).

The Fourth Circuit has no local rule or known internal practice that automatically vacates the prior court judgment upon entry of an order granting rehearing en banc. Its case-by-case practice has been ambivalent. On occasion, where a clear majority of an en banc court wished to reach a different result from that of the panel, the Fourth Circuit has been careful to vacate the inconsistent panel judgment before dealing with the ruling below.[9] Yet on other occasions an equally divided Fourth Circuit has seemingly affirmed a district court judgment, after a panel judgment of reversal, without referring to or vacating the prior panel judgment.[10] The proceeding below in this case appears to fall within the latter category of Fourth Circuit actions.

The decisions of state courts that have dealt with the problems are consistent with the federal rule that seems to prevail in all but the Fourth Circuit. That rule, as expressed by the Florida and North Carolina Supreme Courts, is that, where the order for rehearing does not expressly vacate the prior appellate court judgment, an equal division on rehearing leaves the prior judgment intact, since the equal division results in an inability to reverse or set it aside.[11]

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[9] See, *United States v. Bethlehem Steel Co.*, 323 F.2d 655 (4th Cir. 1963); *Bernstein v. Nationwide Mutual Ins. Co.*, 458 F.2d 506 (4th Cir. 1972).

[10] See, e.g., *Bishop v. Wood*, 498 F.2d 1341 (4th Cir. 1974), aff'd 426 U.S. 341 (1976); *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976), *United States v. Kimes*, 458 F.2d 36 (4th Cir. 1972).

[11] See, *Pitton v. Atlantic Coast Line R.R.*, 198 So. 503 (Fla. 1940), 131 ALR 1003; *Wells v. Davis*, 145 Fla. 17, 198 So. 838 (1940); *Caples v. Taliaferro*, 146 Fla. 154, 200 So. 378 (1941); *Samuels v. Bowers*, 232 N.C. 522, 61 S.E.2d 448 (1950); *Best & Co. v. Maxwell*, 217 N.C. 134, 6 S.E.2d 893 (1950), rev'd on other grounds, 311 U.S. 454 (1951); *Carolina Power & Light Co. v. Merrimack Mutual Fire Ins. Co.*, 240 N.C. 196, 81 S.E.2d 404 (1974).

The sum of the en banc rehearing practices in jurisdictions that have confronted the problem, save for the Fourth Circuit on occasion, is that the mere entry by a majority vote of an order granting rehearing en banc does not suffice to vacate the prior appellate ruling to be reheard. Setting aside such a ruling necessitates some form of majority action by the active circuit judges, be it by specific court order or by a general rule of court. But whatever the mode of expressing such majority action, the point remains that majority inaction with respect to vacating a prior court judgment cannot do service for a specific rule or court order. If the majority rule embodied in § 46(c) is to be respected, that majority must clearly and unmistakably express itself.

All the answers to the foregoing questions must be in the negative. There is no justification for the Fourth Circuit allowing an equal division to ignore unvacated judgments and to substitute diametrically different judgments in their stead. The notion that an equally divided appellate court has no power to reverse the judgment under reconsideration is even more blatantly violated when an equally divided court attempts to leapfrog over an existing judgment setting aside a criminal conviction and to affirm the conviction instead. In that situation, the district court judgment of conviction cannot be before the en banc court for rehearing purposes unless and until the judgment setting aside the conviction has somehow been removed by some form of majority action.

Finally, it must be emphasized that an equal division on an en banc rehearing is the antithesis of the policy and purpose of the en banc statute § 46(c). That policy, of course, is to give to the majority of the active circuit judges the power to administer and develop the law of the circuit and to determine the major doctrinal trends of the future of their court. See, *United States v.*

American-Foreign SS. Corp., supra, at 689-90. It ill serves that noble purpose for an en banc court to enter a meaningless judgment that settles no law for the circuit and determines no major doctrinal trends.[12]

That appears to be the inevitable by-product of a usurpation of judicial power by judges unable to command the votes of a majority of the active circuit judges.

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[12] The First Circuit has given effect to the majority rule policy of § 46(c) in its Rule 16(f), which promises that if a petition for rehearing en banc is granted, "the ultimate decision will be that of the majority of the active judges."

CONCLUSION

For these various reasons, this petition for a writ of mandamus should be granted.

Mandamus should issue to the Fourth Circuit judges qualified to sit en banc in this proceeding, commanding them (1) to vacate the en banc's per curiam order and judgment of July 20, 1979, to the extent that it purports, by an equally divided vote, to affirm the judgments of conviction entered by the District Court for the District of Maryland, and (2) to reaffirm and give effect to the prior panel judgment of the court, dated January 11, 1979, that had vacated those judgments of conviction and ordered a new trial.

Respectfully submitted,

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APPENDIX

JUDGMENT

(Filed January 11, 1979)

United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal From the United States District Court for the District of Maryland.

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of acquittal on Count 23 of the indictment are affirmed. The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk.

JUDGMENT
(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

No. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel,
Appellant.

Appeal from the United States District Court
for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

In consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II,
Clerk.

ORDER

(Filed July 20, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,

Appellee,

v.

Marvin Mandel, et al.,

Appellants.

PER CURIAM:

The judgments of conviction are affirmed by an equally divided court.

A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

Affirmed.

DISSENTING OPINIONS

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for all of the reasons discussed in the majority opinion of the panel. *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), and would add the following additional comments.

I

The point of difference on which the en banc court is evenly divided relates to the denial by the trial judge of requested instructions. As indicated in the panel opinion, I would have reversed because of what I consider error in failing to give a bribery instruction in connection with the mail fraud counts of the indictment, and also for failure to give an instruction concerning Governor Mandel's knowledge of other defendants' financial interests. Without deemphasizing the latter, I think that affirming despite the lack of a bribery instruction for the mail fraud counts is so far from settled precedent that the reasoning should be stated in the opinion of the court. On that account, I state my reasons for considering such denial reversible error.

The mail fraud counts of the indictment had for a substantive basis a charge of bribery. However carefully one may comb the record, one can unearth no basis for wrongdoing by *all* the defendants,[1] which would be violative of the mail fraud statute, other than the charge of the acceptance on the part of defendant Mandel and the giving by the other defendants of a

[1] As the panel opinion pointed out, there were two bases shown by the evidence on which the prosecution for mail fraud in this case could have been pursued: bribery and concealment or misrepresentation of material information. However, evidence of Governor Mandel's connection with the alleged concealment or misrepresentation scheme was tenuous at best.

bribe or bribes. It is clear that such bribery was an essential element of the crime stated in the mail fraud counts of the indictment.[2]

Such was the construction given the indictment at the first hearing before Judge Murray, when one of the issues was a construction of the charges in the indictment. Judge Murray's ruling on this point was clear:

> "While the factual allegations in the indictment make the scheme appear to be a complex and subtle one, the thrust of the charges is simple. In essence, the indictment charges that the defendants devised a scheme to defraud the citizens and the state of Maryland by *bribing* the Governor to assist legislation which would be financially beneficial to the owners of Marlboro. . . ." *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976) (Emphasis added).

And that ruling accorded with the position taken by the government itself at the hearing.

At the first trial, the government asserted that bribery was at the heart of its mail fraud prosecution. Thus, counsel for the government at that trial stated to the jury:

> "Ask yourselves the question, as the evidence comes in, did the benefits that these men were giving to Marvin Mandel really have nothing to do with the benefits that they wanted to get out of the State Government and that to a substantial extent they were getting out of the State Government because that is the question *ultimately* that you are going to have to be deciding." (Emphasis added)

And throughout and until the end of the second trial, although the government may have begun to shift its

[2] Paragraph 27 of count 1 of the indictment alleged that "*Marvin Mandel* would and did . . . *in return for* financial and other benefits . . . act with intent to aid and assist certain legislation and legislative matters financially beneficial to the owners of Marlboro Race Track" (emphasis added). I think this is an accusation of bribery, pure and simple.

position with regard to bribery in connection with the mail fraud counts of the indictment, it continued to emphasize the importance of bribery in connection with those counts by introducing a mass of evidence on the alleged flow of benefits to Governor Mandel from the other defendants in return for official preference, without limiting such evidence to the racketeering counts of the indictment. The pervasive influence of bribery on the whole case is shown by the charge of the trial court to the jury with respect to the mail fraud counts, when, although it had just refused the bribery instruction of the defendants with respect to the mail fraud counts, in stating the charge against the defendants, it related the charge that Governor Mandel had not performed his office "free from bribery." The government at that time did not disclaim the bribery charge, as in fact it should have as a matter of common fairness if indeed it had abandoned the charge. Rather, it stayed silent when it had a duty to speak, and thus had its cake and ate it too.

Despite all this background, the government strenuously objected to any bribery instruction in connection with the mail fraud counts, as requested by the defendants at the conclusion of the testimony. Contrary to the position taken by it essentially at all times prior, the government argued that bribery was not an element of the mail fraud charges and that it was improper to include a bribery instruction in connection with the mail fraud counts. The trial judge accepted this argument and denied the requested instruction.

Even in argument to the jury, counsel for the government argued that bribery was not relevant to the mail fraud counts. They did this on the basis of the trial judge's ruling denying defendants' requested instruction.

On this appeal, however, the government has made a complete flip-flop. It now concedes — contrary to its argument to the trial judge at trial, not to mention to the jury — that bribery is included in the charge under

the mail fraud counts. But, contrary to its position at trial when it induced the trial judge to deny the defendants' request for a bribery instruction, it argues on this appeal that there was no error in the denial of an instruction on bribery under the mail fraud counts because:

(a) The trial judge did define bribery in connection with the racketeering counts and this was sufficient (1) to tell the jury what bribery was and (2) to tell the jury that bribery was included in the mail fraud counts (even though the trial judge specifically refused to so instruct the jury at the instance of the Government itself); and

(b) The trial judge did tell the jury, in summarizing the positions of the parties, that the defendants denied bribery.

This argument was accepted by those of my brothers who would affirm the judgment.

I cannot accept the argument. The government cannot blow hot and cold at the same time. It cannot argue that bribery is not involved in the mail fraud counts at trial and secure a ruling to that effect from the trial judge in connection with the jury instructions and use that ruling as a basis for the argument to the jury that the "whole concept of bribery is relevant only in Counts 21 and 23" (the racketeering counts), and then on appeal shift completely its position and contend that an instruction on bribery was to be treated as having been given, even though such an instruction was not only not included in the instruction on the mail fraud counts but had been specifically ruled to be improper. I cannot agree to such sophistry in a case where a defendant's right to a fair trial is involved.

The government and the trial judge agreed that bribery was an element in the crime charged in the racketeering counts. For that reason, a bribery instruction was given in connection with those counts. Neither the government nor the trial judge thought it sufficient

to omit such an instruction simply because the trial judge had stated the conflicting positions of the parties. But when the trial court gave its instructions on the mail fraud counts, it *purposely* omitted any instruction on bribery. Would not a jury be expected to notice the contrast between the instructions on the mail fraud and racketeering counts? Would it not be reasonable for the jury to assume under these circumstances that bribery was in no way related to the mail fraud counts? And would not this be especially so in view of the argument made by the government counsel, fresh in the minds of the jury, that bribery was irrelevant to the mail fraud counts?

This is an involved case. The prosecution rests on fragmented circumstances, many of the more essential ones being no more than mere rumor and legislative corridor gossip. In such a case, is not a defendant entitled to precise instructions? What was done here was, however, more likely to confuse and mislead than to provide clear guidance for the jury. And that should entitle the defendants to a new trial. The error is not insubstantial; it is fundamental.

I further note that it was not explicitly noted in the panel opinion that a criminal defendant is entitled to an instruction on any theory of defense for which there is a foundation in the evidence, and that a refusal to so instruct is reversible error. Because that principle is so universally recognized and accepted, I should have believed it required no mention or citation. However, since the affirmance of the defendants' convictions must reject this time honored principle, I should point out that every circuit, including this court, has embraced the principle that a criminal defendant is *entitled* to an instruction on any theory of defense for which there is a foundation in the evidence. See, e.g., *United States v. Swallow,* 511 F.2d 415, 523 (10th Cir. 1975), cert. den., 423 U.S. 845; *United States v. Mitchell,* 495 F.2d 285, 287-88 (4th Cir. 1974); *United States v. Noah,* 475 F.2d 688, 697 (9th Cir. 1973), cert. den., 414

U.S. 1095; *United States v. Dana,* 457 F.2d 205, 208 (7th Cir. 1972); *United States v. Blair,* 456 F.2d 514, 520 (3d Cir. 1972); *United States v. Leach,* 427 F.2d 1107, 1112 (1st Cir. 1970), cert. den., 400 U.S. 829; *United States v. Blane,* 375 F.2d 249, 252 (6th Cir. 1967), cert. den., 389 U.S. 835; *Perez v. United States,* 297 F.2d 12, 15-16 (5th Cir. 1961); *Apel v. United States,* 247 F.2d 277, 282 (8th Cir. 1957); *United States v. O'Connor,* 237 F.2d 466, 474, n.8 (2d Cir. 1956); *Tatum v. United States,* 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (D.C. Cir. 1951). The district court's refusal to give the substance of defendants' requested instructions on bribery and knowledge in connection with the mail fraud counts of the indictment clearly violated this principle.

The additional remarks I have made as to the sufficiency of the jury instructions should be read in light of the fact that the panel opinion carried the mail fraud statute near its outer limits, and some cases may arguably indicate beyond. See *Hammerschmidt v. United States,* 265 U.S. 182 (1924). Especially in view of that, it would have been far preferable for the district court to have charged the jury on the only two theories upon which a conviction could have been sustained, concealment or misrepresentation of facts and bribery. This, it did not do, and, assuming that is not reversible, it went further and rather than charge the jury with the law as it applied to the case, it charged the jury as to the contentions of the parties and even refused the defendants' proffered charges, as this dissent and the panel opinion note.

Accordingly, I am unshaken in my belief that the jury was inadequately and prejudicially charged in this case.

II

With respect to the hearsay issue, I add only the following quote from *Kotteakos v. United States,* 328 U.S. 750, 761 (1945):

> "What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.
>
> "Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler v. United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. It is of course highly technical to confer full legal status upon one who has just attained his majority, but deny it to another a day, a week or a month younger. Yet that narrow line, and many others like it, must be drawn. The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."

The hearsay and double hearsay evidence relating to comments allegedly made on the floor of the Maryland Senate, which was the only direct evidence of Governor Mandel's feelings on the veto override, fall precisely within the categories of "gossip, rumor, unfounded report, second, third, or further hand stories," *Kotteakos* decries. They simply do not possess the requisite guarantees of trustworthiness required by Federal Rule of Evidence 802(24).

III

Finally, I note that there are a number of issues raised in this case which are not dealt with in the majority en banc opinion. Discussion of these issues was unnecessary in the majority panel opinion since a new trial was required in all events.

Now, a majority of the court affirms the convictions on all grounds except the jury instructions, on which point the court is evenly divided. I question its decision not to discuss any of the remaining issues raised on

appeal, some of which may present possible grounds for reversal.

For the reasons stated above and in the panel opinion, I respectfully dissent.

I am authorized by Judge Russell to state that he joins in this opinion.

ORDER
(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

Upon consideration of the defendants' petition for another rehearing before the *en banc* court and the response of the United States, each of the judges in regular active service who is not disqualified having been polled, and it appearing that fewer than a majority of them have voted for it,

IT IS NOW ORDERED that the petition for another rehearing *en banc* before the enlarged court be, and it hereby is, denied.

For The Court:

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

October 30, 1979.

STATEMENT WITH RESPECT TO DENIAL OF FURTHER HEARING

(Filed November 1, 1979)

United States Court of Appeals
for the Fourth Circuit

Nos. 77-2487 thru 77-2492

United States of America,
Appellee,

v.

Marvin Mandel, et al.,
Appellants.

MURNAGHAN, Circuit Judge:

This statement is not lightly made. It appears only after reflection, and despite considerations which would normally preclude its seeing the light of day. First, one customarily does not announce a dissent from court action which is taken by vote and without opinion. Second, my past tangential contact with this case while a practicing lawyer would, in ordinary circumstances, dictate that I should recuse myself to avoid the appearance of even the slightest possible bias. Third, close association with the other members of this Court, short though it has been, has already thoroughly confirmed my earlier impression of the dedication, skill, compassion and concern for the Court as an institution of each of the members. The fact that four of my colleagues disagree with me is strong indication that my views may be wrong. Those considerations have not deterred me only because of a strange certainty, transcending the ordinary confidence one has in one's

convictions, that the Court's failure to decide this case constitutes a serious injustice.

It is nearly as important that cases be decided, and the decisions be accorded finality, as it is that they be disposed of absolutely correctly. Courts have, as a consequence, adopted a rule of necessity that an evenly divided appellate court, although it cannot render a decision, affirms the judgment. The unsatisfactory nature of such a decisionless result is reflected, however, in the rule that judgments of equally divided courts are not accorded precedential value. The rule of necessity has, however, no scope for application here. The even division which would normally bring the rule into play is not present when the even division coincides with an expansion of the court's membership. Judge Sprouse and I had joined the Court by the time it considered and acted on the petition for further rehearing.

So I regret the denial of that petition, the granting of which would avoid a situation so frustrating to defendants who have made arguments sufficient to persuade three members of the Court (that is one-half of those who participated in rehearing) that reversal and a new trial are required, if justice is to be accomplished. The defendants and the public generally, in whose service the courts operate, are entitled to a decision of this Court, whether it leads to reversal and a new trial, or whether, through affirmance, it gives requisite certainty and finality to the convictions. This was no ordinary case. Its consequences on the entire political system of the State of Maryland are enormous. It cries out for a proper resolution, where such a resolution is possible.

It would, of course, avail nothing, if yet another rehearing were to result only in a new deadlock. Since an even number of judges has been added to the Court, the danger of a fresh deadlock seems at first a large one, especially in light of the closeness of the issues, a closeness which is evidenced by the splits in both the

panel and the *en banc* court. As things are situated, however, another even division could not occur because any reargument of this case would be heard by an odd number of judges.

Enabling a court to reach a decision is not sufficient reason, standing alone, for a judge to recuse himself or herself. If it were, then, since all judges would be equally subject to the duty to recuse, evenly divided courts would effectively decide cases by lot, or some other arbitrary process, as they selected one of their members for recusal. Nor is preserving the decision making ability of a court sufficient reason for judges to fail to fulfill an otherwise clear obligation to disqualify themselves. But when grounds for a judge's recusal exist, but are ones related to appearances rather than actualities, impact on the court's decision making ability is a factor which the judge should take into account in deciding whether or not to participate. Another rule of necessity is then at work. The appearance of justice suffers far greater damage from a court's unnecessary inability to reach a decision than it does from the participation of a member of the court for whom there are palpable but far-fetched possibilities of bias. Since the reasons why I might recuse myself are of such a tenuous and speculative nature,[1] they would be outweighed by the importance of the court's being able to reach a decision. The court would thus be assured that, whether or not Judge Sprouse had to recuse himself, an odd number of members would participate in any rehearing of this case *en banc*. If he did not recuse himself, I would. If he did recuse himself, I would sit.

For these reasons, I feel compelled respectfully to express my dissent from the decision not to hold a further *en banc* rehearing. To the extent necessary to

[1] While in private practice, I represented two clients, on whose behalf I obtained intervention at the trial level, to contest rulings on the availability of news items emanating from the case, in one instance, and to resist an attempted confiscation of property by the Government, in the other.

permit that expression, I refrain from disqualifying myself.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent from the failure of the court to grant further *en banc* consideration in this case for the reasons expressed in my two opinions previously filed.

In addition, Judge Murnaghan's conditional disqualification now makes it certain that the case can be heard by an uneven number of judges. We know that on one important issue the court was divided 3 to 3, so a rehearing would have to result in a majority vote, one way or the other.

Especially in a criminal case in which people are going to jail by the vote of an evenly divided court, I have more reservations than I can overcome about sending them there without the vote of a majority when the means for getting a majority one way or the other is readily available to the court. I think the court as an institution suffers by our action, for I am not at all sure that we serve properly the appearance of justice when it is within our command so to do.

I am authorized to state that Judge Russell joins me in this opinion.

SUPREME COURT, U.S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1028, 79-1029 and 79-1030

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN MANDEL, ET AL., PETITIONERS

v.

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UNITED STATES OF AMERICA

HARRY W. RODGERS, III and ERNEST N. CORY, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1028

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v.

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel decision (Pet. App. 17a-88a)[1] is reported at 591 F.2d 1347. The order of the en banc court (Pet. App. 7a-15a) is reported at 602 F.2d 653. The order denying a further rehearing en banc by an enlarged court (Pet. App. 1a-5a) is reported at 609 F.2d 1076.

JURISDICTION

The judgment of the en banc court was entered on July 20, 1979. The petition for rehearing was denied on November 1, 1979. On November 20, 1979, the Chief Justice extended the time for filing the petitions for a writ of certiorari to and including December 31, 1979, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether affirmance of judgments of conviction by an equally divided en banc court of appeals, following reversal of the judgments by a panel, violates the en banc statute, 28 U.S.C. 46.

2. Whether the trial court improperly instructed the jury on the elements of mail fraud.

3. Whether petitioners' prosecution for mail fraud constituted an impermissible extension of the federal mail fraud statute, 18 U.S.C. 1341.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1029.

4. Whether the RICO statute, 18 U.S.C. 1961 *et seq.*, applies only to persons involved in organized crime.

5. Whether the forfeiture sanction of 18 U.S.C. 1963 constitutes an impermissible forfeiture of estate.

6. Whether the trial judge improperly admitted hearsay testimony under Fed. R. Evid. 803(24).

7. Whether the trial judge's *Allen* instruction was improper.

STATEMENT

1. Following a jury retrial,[2] petitioner Mandel, then Governor of the State of Maryland, petitioners W. Dale Hess, Harry W. Rodgers, William A. Rodgers, and Irvin Kovens, all Maryland businessmen, and petitioner Ernest N. Cory, a Maryland attorney, were convicted in the United States District Court for the District of Maryland on 15 counts of mail fraud, in violation of 18 U.S.C. 2 and 1341, and on one count of racketeering, in violation of 18 U.S.C. 1962.[3] Mandel

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[2] Petitioners' first trial was aborted because publicity concerning certain jury tampering activities reached the jury. See *United States* v. *Mandel*, 431 F.Supp. 90, 95 (D. Md. 1977). The circumstances surrounding the mistrial are not pertinent to the issues presented here.

[3] Petitioners were indicted as principals and aiders and abetters on 20 counts of mail fraud (Counts 1-20 of the indictment). In various combinations, petitioners were also indicted on four counts of racketeering (Counts 21-24 of the indictment). Prior to trial, the court dismissed one racketeering count (Count 22). The jury acquitted petitioners of three mail fraud counts (Counts 5, 6, and 14). After trial, the court entered judgments of acquittal on two mail fraud counts and one racketeering count (Counts 19, 20 and 23).

was sentenced to four years' imprisonment. Hess, Harry Rodgers and Kovens were sentenced to four years' imprisonment and fined $40,000. William Rodgers was sentenced to 20 months' imprisonment and fined $40,000. Cory was sentenced to 18 months' imprisonment. In addition, pursuant to 18 U.S.C. 1963 (a), Hess, Kovens, the Rodgers brothers and Cory were ordered to forfeit ownership interests in Southern Maryland Agricultural Association, Inc., the corporate owner of the Marlboro and Bowie racetracks. The en banc court of appeals affirmed (Pet. App. 6a).

2. The substance of the mail fraud alleged in the indictment was that beginning in early 1969, and continuing until the date of the filing of the indictment, petitioners devised a scheme to defraud the citizens of Maryland through bribery, misrepresentation and the concealment of material facts, and thereafter used the mails to facilitate the scheme (Pet. App. 19a). In particular, the indictment charged that between 1972 and 1975, petitioners concealed from the Maryland General Assembly and the State Racing Commission the identities of the true owners of Marlboro Racetrack, causing the legislators and the Racing Commission to make decisions beneficial to them; that in his capacity as governor, petitioner Mandel received bribes from the other petitioners in return for his assistance in obtaining legislation favorable to the Marlboro Racetrack; and that Mandel, without revealing his business involvements with the other petitioners, permitted and approved the award of various benefits to business entities in

which they held financial interests. *United States* v. *Mandel*, 415 F. Supp. 997, 1004 (D. Md. 1976) (order denying motion to dismiss indictment).

a. The government's evidence showed that in February 1971 the owners of the Marlboro Racetrack (who at that time did not include petitioners) contracted with the owners of Hagerstown Racetrack for the transfer to Marlboro of 18 racing days allotted to Hagerstown. Since the horse racing business is regulated by the State of Maryland, the proposed transfer of racing days required the approval of the state legislature. In April 1971, the Maryland General Assembly passed House Bill 1128, which authorized the transfer of racing days to Marlboro. However, after receiving advice that the bill was unconstitutional, Mandel vetoed it (Pet. App. 21a-22a).

Following this veto, the owners of Marlboro sold the racetrack to a group of undisclosed clients, represented by petitioner Cory. The group consisted of petitioners Hess, the Rodgers brothers and Irving Schwartz, a longtime business associate of Kovens (Pet. App. 22a). Schwartz, the only purchaser whose identity was known to the sellers, was in fact a front man for Kovens, who secretly provided much of the funding for the purchase (Pet. App. 22a; Tr. 4065, 4069, 4077-4081, 4085-4086, 4094-4095, 6057-6059, 6061, 6065, 6551-6552, 6637-6663, 6667-6675).[4]

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[4] Unless otherwise noted, "Tr." refers to the transcript of petitioners' second trial. "App." refers to the joint appendix filed in the court of appeals.

Shortly after the purchase was consummated, the purchasing group, still withholding their identities from the Maryland Racing Commission, chose Eugene Casey to represent himself as the new owner of Marlboro (Tr. 4318-4319, 4323). Casey publicly announced his purchase of Marlboro on January 1, 1972. A week later, Casey and Cory sent a letter to the Maryland General Assembly advising of Casey's recent acquisition of Marlboro and requesting that Mandel's veto of House Bill 1128 be overriden (Pet. App. 22a; Tr. 4420-4422).

While there was no direct evidence that petitioner Mandel knew the identity of Marlboro's new owners, there was strong circumstantial evidence of his knowledge, including his intense interest in Maryland racing and his close personal relationships with several of the purchasers (Tr. 1705-1716, 8271-8275, 8609-8610, 8629-8631, 8678-8691). In addition, the day before the Marlboro sale was consummated, ten separate telephone calls were placed from Mandel's office to the office of the insurance agency owned by the Rodgers brothers (Tr. 9200). The evidence showed that immediately after the purchase of Marlboro by the other petitioners, Mandel lent his personal support to two pieces of legislation highly beneficial to the racetrack, including House Bill 1128, which he had previously vetoed. During the process of deliberating and voting on whether Mandel's veto of House Bill 1128 should be overriden, Mandel's aides conspicuously failed to lobby in support of his veto as they normally did. State Senate members openly discussed the Governor's lack of support for his own

veto. Moreover, Mandel's chief legislative spokesman, Senator Roy Staten, told several of his senate colleagues that Mandel would like his veto of House Bill 1128 overriden or would not object to an override (Tr. 4843; Pet. App. 23a, 79a-80a). Against this background, on January 12, 1972, the General Assembly overrode the governor's veto of House Bill 1128 by a broad margin, with most of Mandel's supporters in the majority (Pet. App. 79a).

Two months later, the Mandel administration introduced in the Maryland legislature a bill that would consolidate Maryland racetracks and, in so doing, provide substantial benefits to the owners of Marlboro (Pet. App. 23a). In singling out Marlboro for special treatment, the bill went considerably beyond previous consolidation efforts. The Mandel Administration worked hard for the bill's passage, and Mandel personally lobbied legislators to support it (Tr. 4633-4639, 4878, 5051, 5318-5324, 5609, 5682, 5779, 5895-5903, 7621). The consolidation bill was embroiled in controversy from the start because of the large windfall it provided to Marlboro and because of persistent rumors concerning the identities of Marlboro's true owners. In view of this, the Senate Finance Committee requested the State Racing Commission to determine the true identities of the track's new owners. Responding to a specific Commission inquiry, Cory concealed the identities of Hess, Kovens and the Rodgers brothers as the beneficial owners (Tr. 4652-4655). Kovens also sent a telegram to the finance committee denying any involvement with Marlboro

(Tr. 5389-5390). Although the consolidation bill was passed by the Senate and the House of Delegates in an amended form still highly favorable to Marlboro, it was finally defeated on the last night of the legislative session (Tr. 5030-5036; Pet. App. 24a). Ten state senators later testified that knowledge of the identities of the undisclosed owners, as well as Mandel's relationship with them, would have been directly relevant to their deliberations both on the racetrack consolidation bill and on their vote to override the veto of House Bill 1128 (Tr. 5077-5078, 5624-5627, 5685-5687, 5780-5783).

b. At the same time that Hess, the Rodgers brothers and Kovens secretly purchased Marlboro (December 1971), Hess and the Rodgers brothers secretly conveyed to Mandel a 15% interest in Ray's Point, Inc., a 200 acre parcel of highly desirable real estate on Maryland's eastern shore. That interest, which was worth approximately $45,000, was given to Mandel for a total consideration of $150. Unlike all but one of the others, Mandel was not obligated on the mortgage (Pet. App. 26a; Tr. 1873-1875, 1892, 1898, 2123).[5] Documents formaliz-

[5] The objective of the Ray's Point venture was to develop the waterfront real estate and sell individual lots at a substantial profit (Tr. 1771-1778, 1874). Harry Rodgers testified that the venture was designed to yield to each participant a profit of at least $35,000 (Tr. 10132-10133). Hess explained to another Ray's Point partner, Nathan Cohen, that he and the Rodgers brothers "take care of" Mandel in various ways, including allowing him to participate in business ventures without his name appearing in any public record (Tr. 1883-1884).

ing this arrangement were drafted during the early months of 1972, while the legislature was considering legislation beneficial to Marlboro. Although the original corporate minutes listed the names of all the shareholders, William Rodgers ordered the preparation of revised minutes omitting the name of Mandel. In addition, Mandel's participation in the venture was concealed from bank officials and other persons dealing with the Ray's Point venture, as well as from the general public (Tr. 1898-1906, 1785, 2120, 2123; Pet. App. 26a).

In March 1972, Hess became a 9% partner in another venture, Security Investment Company, a real estate partnership in which the Rodgers brothers also had an interest. The partnership leased two office buildings to the Social Security Administration for more than $1.3 million annually (Tr. 2290, 2291, 2295, 2298, 2301-2302, 2418; Pet. App. 26a). While the racetrack consolidation bill was pending, Hess secretly assigned to Mandel a 4% interest in Security Investment, keeping 5% for himself. Although the assignment was formalized in May 1972, Mandel knew before then that he would receive the assignment, which was valued at approximately $140,000 (Pet. App. 26a-27a; Tr. 2337, 2426, 2686-2688, 2692-2693, 8515-8516, 8524-8525). Beginning in May 1972, Hess sent Mandel monthly income checks stemming from his interest in Security Investment (Tr. 2522-2527). Mandel reported these sums on his tax returns as

"dividends" and later as "legal fees" (Tr. 2818, 2843, 2875-2876).[6]

In addition to receiving interests in these two real estate ventures, Mandel received other lavish gratuities from the other petitioners during the period encompassed by the indictment, including several thousand dollars worth of clothing (Tr. 3036-3039, 3238),[7] and jewelry costing nearly $8,000 for his wife (Tr. 3999, 3405) and son (Tr. 3441-3445, 3457-3458). On one occasion, Hess paid for a $3,300 diamond ring for Mandel's son with cash delivered to the jeweler at a New York airport in a paper bag (Tr. 3446-3455). Mandel and his family also received

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[6] Mandel and Hess agreed that Mandel should report these monthly payments as part of an attorney's fee Hess owed Mandel. Accordingly, Mandel reported these funds on his 1973 tax return as "fees" (Tr. 2843). Hess also told an accountant preparing his income tax return that monies paid by him to Mandel were legal fees (Tr. 2552, 2559; Pet. App. 27a). To substantiate this claim, Hess directed his secretary in 1974 to prepare a letter asserting that he owed a $15,000 legal fee to Mandel. The letter was falsely dated March 22, 1968, and was typed on a typewriter Hess had used during 1968 in order to make it appear as if it had been executed prior to Mandel's assumption of office as governor (Tr. 2682-2686). A copy of the letter was then sent to the accountant to substantiate a legal fee deduction. Hess also directed his secretary to rewrite his 1972 and 1973 cash disbursement journals and check stubs by substituting the term "legal fees" for the original "Sec. Inv." on entries describing disbursements to Mandel (Tr. 2665, 2676).

[7] In one instance, the clothing was paid for by checks drawn on the Charlestown Racetrack, which was principally owned by Kovens; the track's records described the purchases as uniforms for the track security guards (Tr. 3209, 3281-3291, 3317-3325, 3346-3361; Pet. App. 25a).

travel and vacations at a Florida resort paid for by Harry Rodgers (Tr. 3036-3040, 3237-3238). In addition, Kovens provided over $100,000 worth of bonds with which to finance Mandel's 1973 property settlement following his divorce (Tr. 3859, 3936, 3941). Over $40,000 needed for alimony payments was also made available to Mandel by Hess and Harry Rodgers through a chain of four "middlemen" who wrote checks to one another. The last individual in the chain, who signed a check made payable to the govenor of Maryland, was a motorcycle salesman who had never met Mandel (Tr. 3551-3553, 3570-3573, 3733-3743, 8801-8807).

c. After the consolidation bill failed to pass in the General Assembly, the petitioners who secretly owned Marlboro continued to conceal their interests from the Maryland Racing Commission. Thus, Cory and Harry Rodgers assembled a group of front men whose names were submitted by Cory in a July 1972 letter to the Commission as those of the new stockholders. In fact, the named individuals were mere nominees who possessed no ownership interest in the track (Tr. 6431-6435, 6440-6444, 6615-6616; Gov. Exh. 12 (App. 2927)). Prior to appearing before the State Racing Commission, Cory also removed a page from the Marlboro stock book that showed the actual ownership of the shares (Tr. 6610-6611). Finally, to complete the deception, he provided the same false information to an official of the Thoroughbred Racing Protective Bureau, to the publisher of a Maryland racing magazine, and to a State Assistant At-

torney General (Tr. 5215-5222, 5399-5408, 6092-6093, 6265-6266; App. 2924, 2930, 2972-2974). With a total lack of accurate information, the Maryland Racing Commission thereafter granted Marlboro a series of benefits, including the award of choice racing dates, which furthered the economic interests of Hess, the Rodgers brothers, Kovens and Cory (Tr. 6134-6163).

In December 1972, the owners of Marlboro considered the advisability of merging with Bowie Racetrack, a larger, more successful enterprise (Tr. 6876). Hess and the Rodgers brothers were informed by their attorney that full disclosure of Marlboro's actual ownership should be made to the Racing Commission in the course of effecting the merger. Hess and the Rodgers brothers decided to consult with Mandel to determine whether such disclosure should be made. Hess later reported that Mandel vigorously opposed disclosure—that "Mandel has scotched coming clean" about the true ownership of Marlboro (Tr. 6938, 6942, 6954-6957).

On December 28, 1972, the Marlboro and Bowie tracks were merged (Pet. App. 24a). Instead of revealing the true ownership interests in the enterprise, the stock of Marlboro and the assets of Bowie were transferred to a newly-chartered corporation, Southern Maryland Agricultural Association, Inc., with the former owners of Marlboro receiving 30% of the stock in the new company (Pet. App. 24a-25a). Hess and the Rodgers brothers then ostensibly transferred their interest to Cory by use of an agreement

that included a non-recourse note. Under the terms of the transfer, the stock would revert to Hess and the Rodgers brothers if Cory were unable to pay the $630,000 purchase price within five years (Tr. 6977-6979; Pet. App. 25a). In a report furnished in response to a Racing Commission request regarding ownership of the Marlboro-Bowie entity, Cory was lisited as the owner of the portion of the enterprise formerly owned by Hess and the Rodgers brothers (Tr. 6159-6160). Schwartz and Casey also testified before the Senate Finance Committee that they were the true owners of Marlboro and that Hess and Kovens had never been owners of the track. In the aftermath of these false representations, the Maryland legislature authorized the transfer of Marlboro's racing days to Bowie. This substantially achieved the results sought in the 1972 consolida ion bill and resulted in large profits for the still undisclosed owners of the merged Marlboro-Bowie entity (Tr. 5071-5073, 5622, 6157).

In February 1975, the day after a meeting with an Assistant United States Attorney investigating the Marlboro racetrack, Cory notified the secretary of the merged entity of the ownership interests retained by Hess and the Rodgers brothers. This disclosure also appeared as a footnote to an annual audit report concerning Maryland racetracks. During a series of press conferences, Mandel denied knowing prior to publication of the audit that his friends possessed an ownership interest in Marlboro (Tr. 7169-7209, 8007).

3. A panel of the court of appeals reversed petitioners' convictions, with one judge dissenting. The panel held that the trial court's charge to the jury was deficient because it failed to give a bribery instruction in connection with the mail fraud counts and failed expressly to instruct that Mandel could not be convicted of mail fraud on a misrepresentation theory unless the jury found that he knew that the other petitioners were the true owners of Marlboro Racetrack (Pet. App. 42a-45a). The panel also held that testimony by several state senators, which repeated statements by out-of-court declarants concerning Mandel's views on racetrack legislation, was inadmissible hearsay (Pet. App. 48a-53a).[8]

After issuance of the panel decision, the government filed a petition for rehearing with a suggestion for rehearing en banc. On April 16, 1979, a majority of the judges eligible to vote granted that request, ordering that "the above cases will be reheard at the June 1979 Session" (79-1028 Pet. 10 n.3). On July 20, 1979, a six-judge en banc court affirmed petitioners' convictions by equal division with the following order (Pet. App. 7a):

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the en banc court would affirm the judgments of conviction against all of the contentions of the appellants

[8] The panel majority also held that it was error for the court to admit certain portions of the Maryland Code of Ethics as circumstantial proof of Mandel's intent to defraud (Pet. App. 45a).

> except the claim of error in the charge to the jury which was the point upon which there was equal division.

The judgment of the en banc court stated that "[i]t is * * * ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed" (Pet. App. 6a).

After the seating of two newly appointed judges, petitioners filed a "Petition for Rehearing with Suggestion for Rehearing Before A Fully Constituted Court in Banc." The court of appeals, this time composed of eight voting members, denied the motion by equal division (Pet. App. 1a-5a).

ARGUMENT

1. In the petitions for mandamus (79-1028 Pet. 14-30) and certiorari (79-1029 Pet. 18-20; 79-1030 Pet. 14-19), petitioners contend that the en banc statute, 28 U.S.C. 46, requires concurrence by a majority of participating judges to render a judgment inconsistent with a panel decision, and thus that the effect of the equal division of the en banc court in this case was not to affirm the trial court's judgment but to affirm the reversal of that judgment by the panel. This claim is without merit. The law on this subject is well settled, and there is no need for review by this Court.

At the outset, we note that the text of the en banc statute lends no support to petitioners' argument. The statute simply provides that "[c]ases and controversies shall be heard and determined by a court or

division of not more than three judges, *unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.*" 28 U.S.C. 46(c) (emphasis supplied). Thus, the statute specifies only the vote necessary for making the threshold determination whether to rehear a case en banc.[9] The statute does not prescribe the number of votes ultimately required to effect affirmance of the judgment of an inferior court by an en banc court. As this Court recently noted, "voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration." *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (emphasis in original); see also *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, 345 U.S. 247, 261-262 (1953).

Indeed, while a majority vote is necessary to grant rehearing en banc, it is well settled that, once this determination has been made by the requisite vote, equal division by the en banc court, following a panel decision, results in affirmance of the judgment of the district court as a matter of law. See, *e.g.*, *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979);[10]

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[9] The statute was satisfied in all respects in this case because a majority of the active members of the court eligible to vote cast their votes to rehear the case en banc. See 79-1028 Pet. 10 n.8.

[10] In *Geders*, the panel reversed the judgment of conviction of the district court. A majority of the active members of the court of appeals subsequently voted to rehear the case

United States v. *Clavey*, 578 F.2d 1219 (7th Cir.), cert. denied, 439 U.S. 954 (1978); *Farrand Optical Co.* v. *United States*, 317 F.2d 875, 885-886 (2d Cir. 1962); *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 294 F.2d 399, 400 (2d Cir. 1961), aff'd on other grounds, 370 U.S. 254 (1962);[11] *Kimes* v. *United States*, 516 F.2d 377, 378 (4th Cir. 1975); *United States* v. *Acosta*, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *United States* v. *Walden*, 464 F.2d 1015, 1016 (4th Cir.), cert. denied, 409 U.S. 867 (1972); *ITO Corp. of Baltimore* v. *Benefits Review Board*, 542 F.2d 903, 905 (4th Cir. 1976), cert. denied, 433 U.S. 908 (1977); *United States* v. *Holmes*, 537 F.2d 227, 228 (5th Cir. 1976).

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en banc with no explicit vacation of the panel decision. 566 F.2d 1227, 1235. Sitting en banc, the court subsequently held: "the court en banc is evenly divided; therefore, the judgment of conviction of the district court is affirmed by operation of law." 585 F.2d at 1305-1306.

[11] Petitioners incorrectly attempt to distinguish *Drake Bakeries* by arguing that in order "[t]o effectuate an affirmance of the district court's order, one of the three judges who voted to reverse the district court changed his vote to produce a 4-2 vote to withdraw the panel decision" (79-1028 Pet. 27 n.8). However, the court was evenly divided on the merits of the issue. Four of the six members agreed that the tie vote resulted in affirmance of the decision of the district court. 294 F.2d at 400. One of the two dissenters, Judge Friendly, apparently later changed his view concerning the effect of a tie vote. See *Farrand Optical Co.* v. *United States*, supra, 317 F.2d at 886; 77 Harv. L. Rev. 767, 768 & n.7 (1964) ("the full bench supplants the panel for the purpose of rehearing the appeal").

This consistently recognized principle is, moreover, a manifestly sensible and proper rule. Once the full court has undertaken to rehear the case, it would be irrational to ascribe greater weight to the vote of some members of the court than to others, simply by virtue of the fortuity of their assignment to the original panel. An equal division of the en banc court of appeals means that a majority of the judges to have passed upon the issue (including the district judge) were in agreement with the ruling from which the appeal was taken. In such circumstances, that ruling should be upheld.

Petitioners nonetheless contend (79-1028 Pet. 26-29) that this principle is inapplicable here because the en banc court never expressly vacated the intervening panel decision. That argument is also insubstantial. The determination by a majority of the members of the court to rehear the case en banc itself vacated the panel decision. As Judge Waterman explained in *Farrand Optical Co.* v. *United States*, *supra*, 317 F.2d at 886 (dissenting on other grounds) (emphasis supplied):

> *It is obvious that when a court of appeals in any case determined by a panel grants a rehearing of the case before the court sitting in banc, the full bench of its judges supplants the panel, i.e., "court or division" of three judges, that first heard and determined the controversy.* So I agree with my colleagues that an in banc court does not sit as an appellate court of review over its own panels. If such were so, the result

reached here by the panel would not have been disturbed.

See also *United States* v. *Gutierrez-Barron*, 602 F.2d 722, 723 (5th Cir. 1979); *United States* v. *Clavey*, *supra*.[12] Petitioners suggestion that the en banc court is reviewing the judgment of the panel and not that of the district court is in fact inconsistent with the terms of Fed. R. App. P. 35(a), which states that "[a] majority of the circuit judges * * * may order that an *appeal* or other proceeding be heard or re-

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[12] There is no merit to petitioners' assertion (79-1028 Pet. 24; 79-1030 Pet. 15-16) that the per curiam order in *Bulluck* v. *Washington*, 468 F.2d 1096, 1122 (D.C. Cir. 1972), conflicts with the foregoing decisions. In *Bulluck*, the district court dismissed the complaint. A panel of the court of appeals affirmed. The court subsequently granted rehearing en banc. The vote of the en banc court was evenly divided. So divided, the court concluded that it could not disturb the "judgment of affirmance." Thus, the evenly divided court effectively affirmed *both* the district court and the panel. That situation is plainly different from the situation here, where the panel reversed the district court. The court in *Bulluck* was not faced with the question presented in this case whether an equal division of the en banc court results in an affirmance of the district court or of the panel's reversal of the district court. If such a question were raised in the District of Columbia Circuit in a future case, there is no reason to infer that the court would reject the consistent line of authority summarized above, which requires affirmance of the district court's decision.

Petitioners' reliance (79-1028 Pet. 24) upon this Court's decision in *Carmichael* v. *Eberle*, 177 U.S. 63 (1900), to support their claim that equal division on the merits is tantamount to denial of a rehearing is misplaced. In *Carmichael*, unlike the instant case, a majority of the judges failed to concur in the threshold question whether a rehearing should be granted. *Id.* at 65-66.

heard by the court of appeals in banc" (emphasis supplied). Since it was petitioners' appeal and not the government's rehearing petition that was being reheard, it was petitioners who had to command a majority of the en banc court to prevail. Indeed, while the en banc court here was equally divided on the merits of one issue, there is no question that the court was other than unanimous in the view that its equal division resulted in an affirmance of the judgment of the district court. See also *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers, supra*, 294 F.2d at 400.[13]

Nor is a different result required because the Fourth Circuit has not promulgated a rule prescribing the effect of a decision rendered by an equally divided en banc court. Although this Court has re-

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[13] As previously noted, a majority of the court of appeals voted to "rehear the case" en banc. The entire court subsequently subscribed to an order and judgment providing expressly that the decision of the district court was affirmed. In these circumstances, the failure of the majority to state that the panel decision was "vacated" when it voted to rehear the case cannot have significance. The entire court has held that the panel decision is superseded and the district court judgment reinstated.

As this Court noted in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1869), "[t]he statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. * * * [T]he judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case."

quired the promulgation of procedural rules necessary to apprise litigants of how to invoke the court's en banc jurisdiction (*Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, *supra*, 345 U.S. at 261-262, 267-268), there is no requirement that a rule specify the legal effect of an en banc decision vis-a-vis an earlier panel decision. This is a matter of judicial administration governed by the case law summarized above and does not implicate the rights of litigants in petitioning for en banc review. Hence, the adoption of rules is not essential.[14]

Petitioners' argument is not aided merely because some circuits have discussed in court publications the effect of granting rehearing on a preceding panel decision. Rather than announcing rules on this subject, the various court publications upon which petitioners rely (79-1028 Pet. 26 n.6) merely recognize the prevailing practice in the circuit. Moreover, the practice recognized in these publications is no diffent from that which governed here. For example in *United States* v. *Gutierrez-Barron*, *supra*, the Fifth Circuit acknowledged that its local Rule 17 (effec-

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[14] Contrary to petitioners' assertion, an explanatory rule is not necessary to caution "judges of those circuits to vote for rehearing only in those cases in which they determine * * * that the panel judgment must be set aside" (79-1028 Pet. 26-27). As this Court explained in *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, *supra*, 345 U.S. at 262-263:

> The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court.

tive October 20, 1979), which provides that "the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of this court", simply "codifi[ed] * * * longstanding practice" (602 F.2d at 723). Likewise, the Seventh Circuit's *Practitioner's Handbook for Appeals* (1979) does not purport to promulgate a procedural rule at all, but simply explains the well established doctrine that "[t]he order granting rehearing in banc vacates the panel decision so that if the court in banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed." *Id.* at 48. This pronouncement is merely a codification of prior practice in the Seventh Circuit. See *United States* v. *Clavey*, *supra*.

Petitioners can hardly claim prejudice from the Fourth Circuit's failure to publish its internal operating procedures.[15] The en banc court's affirmance of the district court's judgment comported with the well established practice in the Fourth Circuit. See *ITO*

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[15] There is no merit to petitioners' suggestion (79-1028 Pet. 12; 79-1029 Pet. 19) that the decision of the en banc court considered only the claims raised in the government's rehearing petition and did not encompass the other questions presented to the panel. As petitioners acknowledge (79-1028 Pet. 12), the order of the en banc court states unequivocally that "'[a] majority of the members of the *en banc* court would affirm the judgments of conviction against *all* of the contentions of the appellants' except the claim of error in the charge to the jury which was the point upon which there was equal division" (Pet. App. 79a) (emphasis supplied). Nothing in the court's order suggests that, contrary to this plain language, it encompassed less than all the issues originally presented in the appeal to the panel.

Corp. of Baltimore v. *Benefits Review Board, supra*; *Kimes* v. *United States, supra; United States* v. *Walden, supra.*[16]

2. At trial, petitioners requested the trial judge to instruct the jury that, in order to return convictions on the mail fraud counts, it was necessary to find that Mandel had been bribed in return for aiding legislation favorable to racetrack interests (79-1029 Pet. 26; App. 106, 122, 253-254).[17] Although the trial judge thoroughly explained the concept of "bribery" in connection with the portion of his instruction

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[16] To the extent that petitioners are contending that it is inappropriate to uphold a criminal conviction when the affirming court is evenly divided, we note that this Court has recognized the propriety of reaching that result. See, *e.g.*, *Biggers* v. *Tennessee*, 390 U.S. 404 (1968) (conviction and 20 year prison sentence affirmed by equally divided court).

[17] Mandel's proffered jury instruction exemplifies the charge petitioners sought with respect to bribery (App. 106; emphasis supplied):

> The indictment in this case charges that the Defendant Mandel schemed to defraud the citizens of the State of their right to his conscientious, loyal, faithful, disinterested and unbiased services as Governor. * * * *Unless you find, beyond a reasonable doubt, that the Defendant Mandel accepted interests in the two business ventures which I have named, Ray's Point, Inc. and Security Investment Company, as bribes for aiding and assisting legislation and legislative matters financially beneficial to Marlboro, you may not find that the Defendant Mandel participated in a scheme to defraud the citizens of the State of their right to his conscientious, loyal, faithful, disinterested and unbiased services.*

dealing with the racketeering counts,[18] he declined to repeat the bribery definition in connection with the mail fraud counts. In addition, Mandel proffered an instruction stating that, in order to convict him of mail fraud, it was necessary for the jury to find that he had actual knowledge that his co-defendants were the beneficial owners of the Marlboro Racetrack. Instead of instructing in these precise terms, the court charged that Mandel could not be convicted of this offense unless he had knowingly participated in the scheme to defraud alleged in the indictment (Tr. 11489, 11490, 11492). Petitioners contend (79-1029 Pet. 20-23, 26-27; 79-1030 Pet. 26-30) that the trial court erred in refusing their proffered instructions regarding the mail fraud counts and in failing to repeat the definition of bribery in connection with the mail fraud counts.

a. Petitioners' contention (79-1029 Pet. 21; 79-1030 Pet. 27-30) that the trial judge erred in failing to give a bribery instruction in connection with the mail fraud counts is without merit and does not warrant further review. Bribery is not an essential

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[18] Counts 21 and 23 of the indictment (App. 79, 83) alleged that petitioners engaged in racketeering activities, *inter alia*, through violations of the Maryland bribery statutes (Count 21 para. 4(b), Count 23, para. 4(b)).

element of the offense of mail fraud, even when the fraud involves abuse of a position of public trust. See generally *United States* v. *Bush*, 522 F.2d 641, 651-653 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme"). As petitioners concede (79-1029 Pet. 21, 28), the indictment alternatively alleged that petitioners violated the mail fraud statute through misrepresentations and concealment as well as through bribery (App. 53). Thus, because petitioners' proffered jury instruction (see note 17, *supra*) required the jury to find bribery beyond a reasonable doubt in order to return convictions on the mail fraud counts, it was clearly erroneous and properly rejected. "A trial judge is under no obligation to give a requested instruction that misstates the law * * * or has been covered adequately by other instructions." *United States* v. *L'Hoste*, 609 F.2d 796, 805 (5th Cir. 1980); see *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).[19]

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[19] Petitioners claim (79-1029 Pet. 26) that the government took inconsistent positions with respect to bribery under the mail fraud counts. More specifically, they claim that throughout the trial the prosecution emphasized bribery in connection with those counts but at the conclusion of the trial abandoned the bribery theory. This contention misdescribes the government's position. The government simply sought to make clear during the hearing on instructions and the jury argument

At all events, the trial judge's instruction, when considered in its entirety (*United States* v. *Park*, *supra*, 421 U.S. at 674-675), provided an adequate definition of bribery to the extent that the jury may have found part of the fraud to consist of secret bribery. Thus, the trial judge fully explained the term bribery in connection with the racketeering counts and elaborated upon the necessity of receiving a gift, benefit, or favor as a *quid pro quo* for favorable official acts (Tr. 11502-11507).[20] As this Court held in *United*

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that, while its theory on these counts *included* bribery as one of the ways in which the fraud was committed, finding bribery in violation of state law was not essential to returning a mail fraud conviction (Tr. 11256-11257, 11382). The government clearly did not abandon the bribery theory. When the government presented a summary of its theory of the case to the court to facilitate jury instructions, it expressly stated that its theory encompassed receipt of rewards by Mandel in anticipation of and in return for various official acts. That theory was clearly explained by the court to the jury (Tr. 11527).

[20] Portions of the court's instruction are set out in the opinion of the dissenting panel member (Pet. App. 68a-70a). The court's charge described the government's bribery theory in connection with both the mail fraud and racketeering counts of the indictment. The court explained that the indictment alleged that the defendants had devised a scheme to defraud the citizens of the State of Maryland of their right to honest government "free from bribery" (Tr. 11473-11474). The court also described the specific benefits that allegedly flowed to petitioner Mandel in exchange for official acts (Tr. 11475-11481). When the court summarized the government's theory under the mail fraud counts of the indictment, it again referred to petitioners' alleged involvement in bribery (Tr. 11525-11528; see also *id.* at 11530-11531, 11534). As previously noted, the term "bribery" was fully and accurately defined by the trial judge when he discussed the racketeering

States v. *Bayer*, 331 U.S. 532, 536 (1947), once an instruction is properly given its repetition is a matter residing within the discretion of the court. See *United States* v. *Haldeman*, 559 F.2d 31, 115 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Honea*, 556 F.2d 906, 908 (8th Cir. 1977). This is especially true when the government offers the same evidence to prove more than one offense in a multi-count indictment. In the present case, "proof of the same gifts to Mandel * * * and the same favors he bestowed" was relied upon "to prove both the mail fraud counts and the racketeering counts" (Pet. App. 70a-71a).[21]

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counts of the indictment (Tr. 11502-11507). Significantly, petitioners' counsel argued at length to the jury that bribery was central to the government's case and that the government had failed to prove bribery (Tr. 11060-11061, 11066, 11120-11121, 11270, 11339-11340, 11343). Under these circumstances, petitioners can hardly contend that the bribery issue was not fairly presented to the jury, that the concept was inadequately defined, or that the theories of defense counsel and the prosecutor were not clearly set forth.

[21] While not claiming insufficiency of the evidence, Harry Rodgers contends (79-1030 Pet. 26-27) that failure to define bribery in connection with the mail fraud counts was prejudicial in his case because there was little evidence that he gave Mandel benefits in exchange for assistance on racetrack legislation. This assessment of the evidence is erroneous. To the contrary, the evidence showed that Harry Rodgers, his brother and Hess secretly transferred to Mandel an interest in the Ray's Point real estate venture almost contemporaneously with the legislature's consideration of the veto override and the introduction by the administration of the consolidation bill (see pages 8-9, *supra*; Pet. App. 25a-26a). Additionally, as Rodgers concedes (Pet. 7-8 n.10), the evidence also

b. The court's instruction also adequately conveyed Mandel's defense theory that he lacked actual knowledge of his co-defendants' interests in Marlboro Racetrack and thus lacked specific intent to defraud. There is, of course, no requirement that the jury be charged in the precise language urged by the defense. See, *e.g.*, *United States* v. *Newson*, 531 F.2d 979, 983 (10th Cir. 1976). Here, the court specifically and repeatedly instructed that a scheme to defraud requires proof beyond a reasonable doubt of "intentional use of false or fraudulent representations." The judge further explained that the purpose of requiring knowing misconduct "is to ensure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason" (Tr. 11489-11492; Pet. App. 71a). Moreover, in describing the government's theory of the case, the court instructed that the government must prove that "the six Defendants all knowingly entered with one another into a scheme to defraud," and "that Mandel knowingly promoted the interests of his friends" (Tr. 11525-11527; Pet. App. 71a). Finally, in giving instructions concerning petitioners' theory of the case, the court carefully described Mandel's defense that he knew nothing about the actual ownership interests

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showed that during the 1972 legislative session he purchased clothing and jewelry for Mandel. The close proximity between these gifts and efforts by the administration to secure passage of legislation favorable to Marlboro Race Track—as well as the secrecy with which the transfers were effected—clearly permitted the inference that the gifts were, in fact, bribes.

of Marlboro during the 1972 legislative session (Tr. 11530-11531).[22]

In sum, "viewed as a whole and in the context of the trial" (*United States* v. *Park*, *supra*, 421 U.S. at 675), the charge was sufficient to submit Mandel's theory of defense to the jury.

3. Petitioners also claim (79-1029 Pet. 28-29; 79-1030 Pet. 19-26) that, to the extent that the government relied on a theory of fraudulent concealment, the reach of the federal mail fraud statute was impermissibly extended here. Specifically, they contend that concealment of the identity of the owners of the racetrack was not prohibited by state law, and accordingly that their conduct could not be a part of a scheme to defraud and, hence, could not form the basis for a federal mail fraud prosecution. This claim was properly rejected by both the panel and the en banc court (Pet. App. 36a-42a).

It is axiomatic that "the concept of fraud in § 1341 is to be construed very broadly * * * [and that] any kind or species of scheme or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used." *United States* v. *States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974), citing *Durland* v. *United States*, 161 U.S. 306 (1896). So too, it is clear that application of the statute does not depend on whether the particular fraudulent scheme constitutes a vio-

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[22] The court's instruction is described in the dissenting opinion of the panel (Pet. App. 72a).

lation of some other state or federal law. See, *e.g.*, *United States* v. *Brown*, 540 F.2d 364, 374 n.7 (8th Cir. 1976); *United States* v. *Bush*, *supra*, 522 F.2d at 646 n.6; *United States* v. *States*, *supra*, 488 F.2d at 767; *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1970); *United States* v. *Keane*, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

As the panel noted (Pet. App. 40a), there are two ways in which concealment from or misrepresentation to government bodies constitutes fraud under the mail fraud statute. First, fraud exists if a public official fails to disclose his own personal interest in a matter about which he must take official action and thereby deprives the public of their right to honest, faithful, and disinterested government. As the court held in *United States* v. *Keane*, *supra*, 522 F.2d at 546:

> It is clear * * * that one who breaches the public trust by actively concealing a personal financial interest from the public and from a public body charged with the responsibility of passing judgment on matters directly affecting that financial interest, and on which he serves and in which he participates in the formulation of the collective judgment of that body, pursuant to his official duties, may be prosecuted for mail fraud.

Accord, *United States* v. *Brown*, *supra*, 540 F.2d at 375; *United States* v. *Bush*, *supra*, 522 F.2d at 652; *United States* v. *Barrett*, 505 F.2d 1091, 1104 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975). See

also *United States* v. *George*, 477 F.2d 508, 512-515 (7th Cir.), cert. denied, 414 U.S. 827 (1973); *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir.), cert. denied, 313 U.S. 574 (1941). Thus, the fraudulent scheme needed to support a mail fraud conviction can be found in Mandel's failure to disclose the fact that he was receiving substantial personal benefits from those who would profit by the racetrack legislation that he was actively supporting in the course of his official duties.[23]

Alternatively, there is a "scheme or artifice to defraud" within the meaning of Section 1341 when any person receives a benefit by action of a public body

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[23] Contrary to petitioners' assertion (79-1029 Pet. 28; 79-1030 Pet. 24), *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), is inapposite. There the defendant, a state legislator, introduced members of an architectural firm who sought state construction contracts to state officials involved in the selection process. For this service, he received a retainer from the firm. In reversing a mail fraud conviction that resulted from this conduct, the court held, *inter alia*, that Rabbitt did not in his official capacity control the award of state contracts to architects. "There is no evidence that Rabbitt failed to carry out the duties and responsibilities of the legislative office for the sake of the [architectural firm]" *Id.* at 1026. In so holding, the *Rabbitt* court distinguished its earlier decision in *United States* v. *Brown*, *supra*, where "the conduct deemed fraudulent deprived the public * * * of its right to honest and fair dealing in the conduct of the officer in question" (583 F.2d at 1025 & n.20). Here, the introduction and support of legislation was squarely within the ambit of Mandel's official duties as Governor of the State of Maryland. Accordingly, the rationale of the *Rabbitt* case is inapplicable.

as a result of misrepresentation or deliberate concealment. As the panel noted (Pet. App. 41a):

> [T]he scheme to defraud can in such a case be said to encompass not only the receipt of the illicit benefit, but also the deprivation of the public of the right to have its officials act on other than false information.

See, *e.g.*, *United States* v. *Feinberg*, 535 F.2d 1004, 1008-1009 (7th Cir.), cert. denied, 429 U.S. 929 (1976); *United States* v. *Mirabile*, 503 F.2d 1065, 1066-1067 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States* v. *Flaxman*, 495 F.2d 344, 346-349 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). Thus, the concealment and misrepresentation by Cory and other petitioners (acting as principals and aiders and abettors) concerning the identities of the actual owners of Marlboro and Bowie Racetrack in order to obtain benefits from the legislature and the State Racing Commission also fell within the prohibition of the mail fraud statute.

Petitioners Cory and Harry Rodgers nonetheless argue (79-1030 Pet. 21) that because the legislature and the State Racing Commission had previously condoned the practice of submitting the names of nominees in reporting racetrack ownership, and no law or regulation expressly required disclosure of actual ownership interests, their specific and repeated misrepresentations to the Commission were not fraudulent under Section 1341. Besides being factually unfounded (see pages 33-34, *infra*), this contention is nothing more than a claim that the fraud was not in

violation of any specific state law and that, in any event, the information would not have been important to the state authorities. However, neither of these grounds constitutes a defense to a mail fraud charge. See the cases cited on page 30, *supra*. See also *United States* v. *Reid*, 533 F.2d 1255, 1261 & n.24 (D.C. Cir. 1976) (collecting cases) (no need to prove reliance or injury); *United States* v. *Keane*, *supra*, 522 F.2d at 544-545. The gravamen of mail fraud is simply the formulation of a scheme to defraud and use of the mails in furtherance of the scheme. See, *e.g.*, *Pereira* v. *United States*, *supra*, 347 U.S. at 8.

While we agree that an innocent or negligent misrepresentation is not a violation of the statute, the trial judge's instructions fully assured that petitioners could not be convicted unless their misrepresentations were accompanied by the requisite fraudulent intent. Thus, the judge instructed that, while submission of false information to public officials may fall within the ambit of the mail fraud statute, such conduct is only an offense if it is part of a scheme to defraud that involves "intentional use of false * * * representations for the purpose of gaining a valuable undue advantage or working some injury" to others (Tr. 11488-11489). Thus, there is no possibility that petitioners were convicted for making innocent omissions in good faith reliance on the perceived policies of the Commission or the absence of specific disclosure regulations.

Moreover, the evidence establishes that Cory intentionally concealed the identities of the owners of

the racetrack enterprise and that the false information he provided the Racing Commission did in fact affect the Commission's deliberations. For example, in response to official inquiries concerning the identity of the beneficial owners of 175,000 shares of racetrack stock that Cory held as attorney, Cory submitted a letter to the Commission that concealed the ownership interests of Hess, William Rodgers, Harry Rodgers and Kovens (Tr. 6135, 6139-6140; Govt. Exh. 12 (App. 2927)). A Racing Commissioner testified that knowledge of the controlling interests in the racetrack enterprise was essential to proper execution of his duties and that, in making decisions concerning the Marlboro enterprise, he relied upon the false information provided by Cory (Tr. 6139, 6142-6144, 6153-6154). Hence, there is no merit to Cory's claim that the concealment was inconsequential.[24]

4a. Petitioners further contend (79-1029 Pet. 29-32) that Congress intended to limit application of the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, to persons shown to be professional racketeers or involved in organized crime, and that in the absence of proof that they were such persons, they were improperly convicted under the

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[24] Racing Commissioner Jackson testified that he was quite interested in learning who the true owners of the track were (Tr. 6135, 9868). Here, of course, the evidence showed not only that petitioners concealed their identities by use of a nominee, but also that they affirmatively misrepresented the relevant facts after repeated specific requests for truthful information.

statute.[25] This contention, which has been rejected by every court to have considered it, is without merit.[26] It is essentially the same as the claim rejected by this Court in *United States* v. *Culbert*, 435 U.S. 371 (1978), in the context of the Hobbs Act.

While the stated purpose of the Organized Crime Act, of which the RICO statute is a part, is to eradicate organized crime, the statute does not require proof that the defendant is connected with organized crime. *United States* v. *Aleman*, 609 F.2d 298, 304 (7th Cir. 1979), petition for cert. pending, No. 79-1009. It is the defendant's behavior, not his status, that is determinative. See, *e.g.*, *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v.

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[25] Mandel was convicted on Count 21, which alleged that he "directly and indirectly, acquired and maintained an interest in and control of the Security Investment Company through a 'pattern of racketeering activity,' including mail fraud and bribery," in violation of 18 U.S.C. 1962(b). The remaining petitioners were convicted on Count 24, which alleged that they "conducted and participated, directly and indirectly, in the conduct of the affairs of the Marlboro Race Track through a 'pattern of racketeering activity', including mail fraud," in violation of 18 U.S.C. 1962(c). App. 31, 37.

[26] See *United States* v. *Aleman*, 609 F.2d 298, 302-305 (7th Cir. 1979), petition for cert. pending, No. 79-1009; *United States* v. *Campanale*, 518 F.2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D. N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa. 1979); *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1018. See also *United States* v. *Forsythe*, 560 F.2d 1127, 1135-1136 (3d Cir. 1977).

Campanale, 518 F.2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Thus, on its face Section 1962(b) punishes anyone who, through a "pattern of racketeering activity," maintains an interest in or control over any enterprise engaged in interstate commerce. Similarly, Section 1962(c) prohibits anyone from conducting the affairs of an enterprise engaged in interstate commerce through a "pattern of racketeering activity." In turn, "racketeering activity" is defined to include the violation of a number of state and federal criminal statutes, including the federal mail fraud statute. See Section 1961(1). In short, Congress has enacted a comprehensive statutory scheme designed to punish "any person" who engages in a pattern of proscribed racketeering activity. Nothing on the face of the statute suggests that, in addition to these requirements, its application is limited to persons engaged in organized crime. See *United States* v. *Campanale*, *supra*, 518 F.2d at 364.

Although recourse to legislative history is unnecessary since the statute clearly defines the conduct it prohibits, it is equally apparent that the statute's drafters intended to punish "any person" falling within the statutory prohibition regardless of whether the person was affiliated with organized crime. While Congress' primary concern in enacting the statute was to prevent the corruption of business enterprises by organized crime (see Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, Section 1,

84 Stat. 922, 18 U.S.C. 1961 note), Congress also made it clear that the statute "shall be liberally construed to effectuate its remedial purposes" (Pub. L. No. 91-452, Section 904, 84 Stat. 947, 18 U.S.C. 1961 note). In keeping with its desire to promote the liberal application of the statute, Congress flatly rejected suggestions that a definition of organized crime be added to the statute (see 116 Cong. Rec. 35343-35344 (1970)) in order to provide the Attorney General maximum flexibility in effectuating its broad objectives (*id.* at 35302 (remarks of Rep. Celler)). Congress' actions offer convincing evidence that it did not intend that a connection with organized crime be demonstrated as a prerequisite to conviction. *United States* v. *Mandel, supra*, 415 F. Supp. at 1019.[27]

b. Petitioners also argue (79-1029 Pet. 32-33) that imposition of multiple punishments[28] for violation of the RICO statute and the commission of predicate offenses is impermissible under the Double Jeopardy Clause. However, petitioners did not raise this point in the court of appeals. Accordingly, they

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[27] Indeed, if Congress had intended that membership in organized crime be an element under the racketeering statute, it certainly would have defined "organized crime." Without a definition, "the highly subjective and prejudicial connotations of that term[], would simply render the statute unenforceable, a result plainly not in the contemplation of Congress." *United States* v. *Mandel, supra*, 415 F. Supp. at 1018; see also *United States* v. *Culbert, supra*, 435 U.S. at 374.

[28] While petitioners' prison sentences were concurrent, those petitioners who were fined received separate fines on the mail fraud and racketeering counts (Sentencing Tr. 120, 128-129, 136-137, 161, 168).

are barred from pursuing it now in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

This issue resembles that currently before the Court in *Whalen* v. *United States*, No. 78-5471 (argued Nov. 27-28, 1979), which concerns the permissibility of consecutive sentences for felony murder and for a rape that constituted the predicate offense upon which the felony murder conviction was based. Here, as in *Whalen*, the offenses appear to be separate under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), since the compound offense (conduct of an enterprise by racketeering or felony murder) and the predicate offenses (various specified felonies such as mail fraud or rape) each contain unique elements not shared by the other; at the same time, with the RICO statute as with felony murder, proof of the compound felony requires proof of the commission of one or more of a specified class of predicate offenses. See *United States* v. *Solano*, 605 F.2d 1141, 1144-1145 (9th Cir. 1979), cert. denied, No. 79-5541 (Jan. 7, 1980); see also *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Regardless of the disposition of *Whalen*, however, there is no occasion for this Court to address the issue in the present case or to hold the case for *Whalen*, in view of the failure of petitioners to raise the issue below. Petitioners will not be remediless if review is denied here but *Whalen* is decided in a manner that lends force to their contentions, since petitioners

would be free at any time to move in the district court under Fed. R. Crim. P. 35 or 28 U.S.C. 2255 to correct their sentence if it is indeed illegal.[29]

5. Petitioners also assert (79-1029 Pet. 33-37) that the forfeiture of their ownership interests in Marlboro Racetrack pursuant to 18 U.S.C. 1963 (Count 24)[30] constituted a forfeiture of estate prohibited by the Constitution[31] and federal statute (18 U.S.C. 3563). The contention is insubstantial.

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[29] We note that, even if the government's contentions were to be rejected in *Whalen*, it by no means follows that petitioner's sentences are defective. In *Whalen*, the felony murder conviction was based upon a single underlying felony; on the facts of the case, therefore, the proof of that felony was in a sense necessary to sustain the felony murder charge. Here, by contrast, while only two acts of racketeering are statutorily required to sustain a RICO charge, far more than two were in fact charged and proved. The impact of this distinction in the particular circumstances of this case would plainly be a matter best addressed in the first instance by the district court.

[30] 18 U.S.C. 1963 provides in pertinent part:

> (a) Whoever violates any provision of section 1962 of this chapter * * * shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in * * * or property * * * of any kind affording a source of influence over, any enterprise which he has established operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[31] United States Constitution, Art. III, Sec. 3, provides in part:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The common law doctrine of forfeiture of estate required forfeiture to the sovereign of all the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited * * * in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender * * *." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute was to divest persons engaged in organized criminal activity of their interests in organizations acquired or operated by racketeering methods. *Id.* at 79-80. See *United States* v. *Rubin*, 559 F.2d 975, 991-992 (5th Cir. 1977).[32]

As petitioners acknowledge (79-1029 Pet. 34), there is nothing novel about forfeiture statutes directed at such objectives. Following enactment of the Constitution, statutes providing for *in rem* forfeiture of property were enacted to reach many types of property used in the conduct of criminal enterprises. See, *e.g.*, 15 U.S.C. 6; 21 U.S.C. 824(f); 26 U.S.C. 7301;

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[32] Thus, this case does not involve the issue discussed by petitioners (79-1029 Pet. 36) whether due process proscribes forfeiture of property that has not been used in any criminal activity. Indeed, petitioners do not even suggest that there was an insufficient nexus between Marlboro Racetrack and the criminal activity alleged in the indictment.

49 U.S.C. 781-782. Because the object of *in rem* forfeiture proceedings is to penalize the commission of an offense against the law, such proceedings are quasi-criminal in character. *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). This Court has repeatedly upheld application of such *in rem* forfeiture statutes even when, unlike the present case, they impose a penalty on an owner of property who has not used the property for criminal purposes. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 683; *Goldsmith-Grant* v. *United States*, 254 U.S. 505, 510-513 (1921).

It is immaterial that RICO imposes a forfeiture directly upon the offender following his conviction, rather than in a separate *in rem* proceeding brought against the offending property. Insofar as both procedures are designed to penalize the commission of an offense and result in forfeiture of property related to the criminal enterprise, "there is no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *United States* v. *Huber*, 603 F.2d 387, 397 (2d Cir. 1979), petition for cert. pending, No. 79-896; see also *United States* v. *L'Hoste*, *supra*, 609 F.2d at 813 n.15; cf. *Shaffer* v. *Heitner*, 433 U.S. 186, 207 & n.22 (1977).

There is no substance to petitioners' claims (79-1029 Pet. 36-37) that application of the RICO forfeiture statute constitutes cruel and unusual punishment. In rejecting an identical Eighth Amendment

claim, the court held in *United States* v. *Huber*, *supra*, 603 F.2d at 397:

> We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime.

6. Although not admissible under any specific exception to the hearsay rule, the trial judge admitted into evidence the hearsay statements of several state senators regarding Mandel's views on the veto override. The trial judge admitted these statements pursuant to the residual exception to the hearsay rule contained in Fed. R. Evid. 803(24).[33] Petitioners contend (79-1029 Pet. 37-40) that these evidentiary rulings constitute an improper dilution of

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[33] Senators Crawford and Thomas testified that they had short discussions with Senator Roy Staten, Mandel's chief spokesman in the Senate, immediately prior to the override vote and that Staten stated that Mandel would like the veto overridden or that Mandel would not object to an override (Pet. App. 80a; Tr. 4842-4843, 5248-5249). In addition, Senator Lapides testified that he based his conclusion that Mandel wanted the veto overridden on his knowledge of the change in track ownership and a conversation he had with Senator Mitchell (Tr. 5002-5003). Finally, Senator Coollahan testified that, based upon a conversation with other unidentified senators, he felt Mandel did not care about an override of his veto (Tr. 5670-5677).

the hearsay rule. However, Rule 803(24) plainly allows the introduction of declarations that do not fall within other specific exceptions to the hearsay rule if there are "equivalent circumstantial guarantees of trustworthiness" and if the court determines that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The trial court did not abuse its discretion under these standards. See, *e.g.*, *United States* v. *Friedman*, 593 F.2d 109, 118-119 (9th Cir. 1979); *United States* v. *Bagley*, 537 F.2d 162, 166-167 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).

a. It is well recognized that extrinsic corroborative evidence is sufficient to satisfy the "trustworthiness" requirement of Rule 803(24). See *United States* v. *Garner*, 574 F.2d 1141, 1144-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *West*, 574 F.2d 1131, 1134-1135 (4th Cir. 1978); *United States* v. *Ward*, 552 F.2d 1080, 1083 (5th Cir.), cert. denied, 434 U.S. 850 (1977).[34] In the

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[34] These cases involved the admission of declarations under Fed. R. Evid. 804(b)(5), a companion residual exception that permits admission of certain hearsay statements when the declarant is unavailable. The same standards apply under Rule 803(24). See *United States* v. *Carlson*, 547 F.2d 1346, 1353 n.3 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); 4 *Weinstein's Evidence* ¶ 804(b)(5)[01] (1975).

present case, there was ample corroboration of the out-of-court declarations of the senators that Mandel was not opposed to a veto override. For example, when the Senate Majority Leader requested guidance from one of Mandel's lobbyists concerning the administration's position on the override, the lobbyist did not urge support for the Governor's veto but instead simply shrugged his shoulders and walked away (Tr. 4594-4595). Moreover, a number of senators testified that, contrary to custom, there was a conspicuous absence of lobbying that day by Mandel's aides to obtain support needed to sustain his veto (Tr. 5309-5310, 5601, 5669-5670, 6311, 6364; Pet. App. 83a). While an override of any of Mandel's vetoes was highly unusual, the veto of House Bill 1128 was overridden by a surprisingly large majority that included Mandel's closest supporters, who voted as a bloc (Tr. 4597, 5010-5012, 5310, 5769). Indeed, several of these supporters originally voted against the bill but, following Mandel's veto, voted to override the veto and make the bill into law (Tr. 5011). Finally, Kovens, a longtime friend of Mandel, lobbied on behalf of the veto override (Tr. 6310).

While these facts clearly corroborate the hearsay statements of the senators—statements that were mutually supportive of each other—the circumstances under which the statements were made also demonstrate that the senators had an incentive to speak truthfully and no reason to misrepresent the facts. See, *e.g.*, *United States* v. *McPartlin*, 595 F.2d 1321, 1350 (7th Cir. 1979), cert. denied, No. 78-1751

(Oct. 1, 1979); *United States* v. *Friedman*, *supra*, 593 F.2d at 119; *United States* v. *Leslie*, 542 F.2d 285, 290 (5th Cir. 1976); *United States* v. *Iaconetti*, 406 F. Supp. 554, 558-560 (E.D.N.Y.), aff'd, 540 F.2d 574, 577-578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). Thus, the principal declarant, Senator Staten, was recognized as the leading spokesman for the administration's position on the Senate floor (Pet. App. 83a). His statements concerning the administration's position on the veto override were not likely to be ill-informed or biased. Moreover, all of the statements were made and overheard almost contemporaneously with the declarant's perception of Mandel's acquiescence in the veto override. This circumstance made a calculated misstatement unlikely. See *United States* v. *Medico*, 557 F.2d 309, 315-316 (2d Cir. 1977); *United States* v. *Iaconetti*, *supra*, 406 F. Supp. at 559. Thus, as Judge Butzner noted in his dissent from the panel decision (Pet. App. 82a), "the statements were quite like the hearsay declarations of present sense impression admissible under Rule 803(1)." [35]

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[35] There is no factual basis for the assertion of the panel majority that "[s]ome of the most damaging hearsay statements were repeated by long-time political enemies of the Governor. Further, the statements were made on and around the Senate floor in the heat of political battle, where rumors, opinion and gossip abound" (Pet. App. 51a-52a).

Only one of the government's witnesses, Senator Lapides, classified himself as a political opponent of the administration, and he volunteered that Mandel had been an excellent governor in many respects (Tr. 5159). While the defense attempted to demonstrate that Senator George Snyder was also biased against Mandel, Senator Snyder did not present any

Most importantly, the availability of the declarants to testify at trial provided a strong guarantee of the "trustworthiness" of the declarations. See *United States* v. *Leslie, supra*, 542 F.2d at 290; *United States* v. *Iaconetti, supra*, 540 F.2d at 577-578. All the senators present on the day of the veto override, with the exception of two who died before trial, were available as witnesses. In fact, 17 of the surviving 38 senators, including Senator Staten, actually testified.[36] Thus,

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damaging hearsay testimony. Senator Thomas, one of the senators who quoted Senator Staten with respect to Mandel's position on the veto override, testified that his relationship with Mandel had been "very cordial and friendly" (Tr. 5242).

Similarly, nothing in the record supports the statements of the panel majority (Pet. App. 51a-52a) that the hearsay statements were made while the legislature was in a state of confusion. While there was some testimony concerning confusion in the legislature on the last day of the legislative session, when the consolidation bill failed to reach a vote, the record does not show that a similar state of affairs existed on the first day of the session, when the veto override was considered. In fact one senator described the circumstances of the veto override as "onesided" and "routine" (Tr. 4593). Finally, none of the facts surrounding the hearsay statements here in question even suggests that they were made in the heat of political battle. The most damaging declarations were made by Mandel's floor leader to other senators while conveying the administration's position on the override (Pet. App. 80a).

[36] Senator Staten testified as a defense witness. He denied making the declarations attributed to him and denied ever speaking with Mandel on the veto override (Pet. App. 83a).

In view of the testimony presented by the out-of-court declarants and their availability as witnesses, there is no merit to petitioners' suggestion (79-1029 Pet. 38) that the admission of the hearsay testimony raises a possible violation of the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149, 160-161 (1970).

there was ample opportunity for cross-examination of the senators who made out-of-court statements about the circumstances of the veto override.

b. Petitioners nonetheless contend (79-1029 Pet. 37-38) that the declarations should have been excluded because the government failed to advise them in advance of trial of its intention to introduce the statements, as required by Rule 803(24). However, as Judge Butzner noted in his dissent from the panel decision (Pet. App. 85a), petitioners "had adequate notice of the government's intention to proceed as it did". At an in-chambers conference during the first trial, the court ruled that the senators' hearsay testimony was admissible and required the government to furnish petitioners with copies of the transcripts of the senators' grand jury testimony. Thus, although the government could not give petitioners the names of certain out-of-court declarants whose identities it did not know and could not learn through reasonable investigation, it provided them with the relevant information in its possession and alerted them to the substance of the out-of-court declarations—information that permitted them to fashion their defense.[37] At the in-chambers conference in the district court,

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[37] The panel majority noted (Pet. App. 51a) that the government could not give the names and addresses of several out-of-court declarants whose identities could not be recalled. However, the defense was fully apprised of the substance of their statements. Moreover, their statements merely repeated the statements made by Senator Staten. In situations in which the declarant's address and name are unknown despite reasonable efforts to locate him, it is sufficient to dis-

both defense counsel and the trial judge acknowledged that the transmission of the transcripts to defense counsel fulfilled the purpose of the notice requirement of Rule 803(24) (see pages 3612-3613 of the first trial transcript).[38]

7. Finally, petitioners contend (79-1029 Pet. 40-41) that the trial court erred in giving a modified *Allen* instruction.

Following seven days' deliberation, the court was notified by the jury foreman that the jury was unable to reach a unanimous decision (Tr. 11709-11710).

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close the information the proponent has been able to acquire by reasonable inquiry. 4 *Weinstein's Evidence, supra,* ¶ 803 (24) [01], at 803-243. See *United States* v. *Medico, supra,* 557 F.2d at 316.

[38] Thus, there is no substance to petitioners' claim (79-1029 Pet. 38) that the holding of the en banc court conflicts with the decisions of other circuits. In *United States* v. *Oates,* 560 F.2d 45 (2d Cir. 1977), the court noted that "the defense was unaware that the chemist's report and worksheet would be offered in lieu of the testimony of [the chemist] himself" (*id.* at 72 n.30). Similarly, in *United States* v. *Davis,* 571 F.2d 1354 (5th Cir. 1978), the court noted that "the Government made no attempt [to give] the * * * defense the required advance notice of the hearsay evidence to be offered at trial" (*id.* at 1360 n.11). And in *United States* v. *Ruffin,* 575 F.2d 346 (2d Cir. 1978), the court held that despite the failure of the government to give any pretrial notice, error in the admission of the hearsay testimony was harmless (*id.* at 357-359). Finally, in *United States* v. *Lyon,* 567 F.2d 777 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978), the court held that strict compliance with the notice rule is not required where, as here, the defendant was aware of the hearsay declarant's identity prior to trial and knew the substance of the declarant's statement. *Id.* at 784, citing *United States* v. *Carlson, supra,* 547 F.2d at 1355.

The court then assembled the jury and gave a modified *Allen* instruction.[89] After continuing deliberations for an additional six days, the jury returned its verdict (Tr. 11773).

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[89] In its entirety, the instruction stated as follows (Tr. 11710-11711):

> Members of the jury, in order to return a verdict, each juror must agree to the verdict. In other words, your verdict must be unanimous. Jurors have a duty to consult with one another and to deliberate with a view of reaching an agreement, if it can be done without violence to individual judgment. Although each juror must decide the case for himself or herself, this should only be done after an impartial consideration of the evidence with his or her fellow jurors.
>
> In the course of deliberations, a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it is erroneous. Each juror who finds himself to be in the minority should reconsider his views in the light of the opinions of the majority. Conversely, each juror who finds himself or herself in the majority should give equal consideration to the views of the minority. No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors for the purpose of returning a verdict. But remember also, after full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.
>
> For the parties that are involved in this lawsuit, the Government and the Defendants, this case is an important one and its presentation to you has involved expense and expenditure of time by both the Government and the Defendants.
>
> Now, Mister Foreman and members of the jury, please retire and further deliberate.

This Court has consistently declined to review claims similar to those presented by petitioners (see, *e.g.*, *Lacey* v. *United States*, cert. denied, 439 U.S. 832 (1978); *United States* v. *Dyba*, 554 F.2d 417 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976)), and there is no reason for a different result here. The instruction given by the trial judge was carefully balanced. It emphasized the responsibility of both the majority and the minority jurors to reexamine their views from the perspective of the opposing viewpoint. It also made it clear that, while it was the jury's responsibility to return a verdict if possible, no juror should surrender his or her honest convictions simply to achieve unanimity (Tr. 11710-11711).[40] Indeed, that the jurors here diligently per-

[40] Accordingly, there is no conflict between the decision below and the cases on which petitioners rely (79-1029 Pet. 41). In *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969), the court's principal criticism of the *Allen* charge given by the trial judge was that it contained no balancing admonition that the majority reexamine its position from the perspective of the views of the minority, and that it imposed a premium upon reaching a unanimous verdict at the expense of conscientiously held views. *Id.* at 414-417. Neither of these factors is present here. Notwithstanding these criticisms, the court affirmed the conviction but precluded future use of the *Allen* charge in an exercise of its supervisory power (*id.* at 420). In *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), the court of appeals expressly approved the use of "carefully worded and timed supplemental instructions" (*id.* at 932) when a jury is unable to reach a verdict. The court adopted the instruction recommended by the American Bar Association in an exercise of its supervisory power. Finally, in

formed their duties free of any coercive influence is manifest from the fact that they deliberated an additional six days before reaching a verdict.[41]

CONCLUSION

The petitions for a writ of certiorari and a writ of mandamus should be denied.

Respectfully submitted.

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MARCH 1980

United States v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971), the court reversed the defendants' convictions because the trial judge added unduly coercive comments to an otherwise permissible *Allen* charge. *Id.* at 1180-1184. As in *Brown*, the court announced adoption of the American Bar Association model instruction.

[41] Indeed, after five days of additional deliberation, the jury requested portions of the transcript to facilitate its effort to reach a verdict. The trial judge declined to follow suggestions from petitioners' counsel that further inquiry be made regarding the status of the jury's deliberations (Tr. 11727, 11736).

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ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The fifty-one page brief in opposition is indicative of the importance that the Government attributes to the questions raised in both the petition for mandamus and the petition for certiorari. Petitioners suggest that the vigor and extensiveness of the dialogue between the Petitioners and the Government serve to augment the substantiality and reviewability of the various questions presented.

Petitioners file this reply not to reiterate any arguments set forth in their petitions but to clarify some of the misconceptions evidenced in the Government's opposition brief concerning some of the major questions involved. A

number of the questions presented in the petition for certiorari need no extended rebuttal. What follows is designed to place in proper focus those questions which the Government has rendered askew.

I. THE GRANT OF A REHEARING *EN BANC* DID NOT CONSTITUTE A WITHDRAWAL OR VACATION OF THE PANEL JUDGMENT. IN THE ABSENCE OF A JUDGMENT ENTERED BY A MAJORITY OF THE *EN BANC* COURT, THE PANEL JUDGMENT REMAINS IN FULL FORCE AND EFFECT.

There is one issue before this Court which need be dispositive of this entire proceeding, rendering it unnecessary to review and resolve any of the seven questions presented by the petition for certiorari. That issue is the subject for the petition for a writ of mandamus. Does an equally divided *en banc* court of appeals have any judicial power to affirm judgments of conviction when a prior panel judgment vacating those same judgments of conviction remains outstanding?

The Government's response (Br. Opp. 15) is that an affirmative answer to that question is so "well settled" by "the law on this subject" that the question is without merit for purposes of review by this Court. That response reflects a misapprehension of the evidence in this case as well as "the law on this subject."

That the answer to the mandamus question must be in the negative is demonstrable from the following factors:

1. The Government is incorrect in its contention that the *en banc* statute, 28 U.S.C. § 46(c), is concerned only with the vote necessary for "the threshhold determination" whether to rehear a case. To the contrary, "the full scope of § 46(c)" is a commitment of "the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the

division." *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 261 (1953).

2. It follows that once a valid opinion and judgment have been rendered by a panel, only a majority of the active circuit judges has *en banc* power to rehear the case and to vacate, alter or reverse the panel's prior opinion or judgment.

3. The only *en banc* power exercised in this case by a majority of the active circuit judges of the Fourth Circuit was the order granting rehearing *en banc*. That order did not purport to alter or set aside the panel's opinion and judgment of January 11, 1979. The legal effect of the order granting rehearing *en banc* was that described by the Florida Supreme Court when confronted with an identical situation, *Florida Motor Lines, Inc. v. Hill,* 126 Fla. 586, 143 So. 261, 262 (1932), where it was said that:

> Thus the original judgment of this court that the judgment of the circuit court be reversed was merely suspended, and not annulled, vacated, or set aside, as might have been done by a special and affirmative order to that effect entered at the term during which the rehearing was granted.

It should be added that the Florida court felt that the legal effect of such a rehearing order was "controlled by the majority ratio decidendi of . . . *Carmichael v. Eberle,* 177 U.S. 63."

4. The Government nowhere denies that the panel judgment of January 11, 1979, which vacated the judgments of conviction, is still extant today, merely being in a state of indefinite suspension.

5. It cannot be said that a majority decision to rehear an appeal is *ipso facto*, a decision to set aside the judgment previously entered by a panel. To suggest that a vote to grant rehearing is necessarily a vote to set aside a panel

judgment is to ignore the clear pronouncement of this Court that "voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc . . ." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (emphasis in original).

6. In keeping with the principle of the *Moody* case, it is well established that, in the absence of an explicit provision in an order or local rule entered by majority action, an order granting rehearing does not address the merits of the case and does not disturb the judgment previously entered by the panel. See *Bulluck v. Washington*, 468 F.2d 1096, 1122 (D.C. Cir. 1972). As we noted in our petition, and as the Court held in *Bulluck*, when rehearing is granted without vacating the panel judgment, and when the *en banc* court fails to enter a majority judgment, the panel judgment must remain in full force and effect.

7. While the Government would have this Court believe that some other rule prevails generally in other courts of appeals, and that an order granting rehearing automatically vacates the panel judgment (Br. Opp. 16-20), some of the very cases cited by the Government hold otherwise. In the Second Circuit, for example, after an *en banc* court found itself equally divided on the merits, the judges voted separately on the question whether to vacate the panel judgment, doing so only by majority vote. *Drake Bakeries, Inc. v. Local 50, American Bakery & C. Wkrs.*, 294 F.2d 399, 400 (2d Cir. 1961). In *Farrand Optical Co., Inc. v. United States*, 317 F.2d 875 (2d Cir. 1962), cited by the Government, the court granted rehearing *en banc*, keeping the panel judgment extant. The *en banc* court, finding itself equally divided on one issue, remanded the case to the panel for further consideration of its outstanding judgment. Only the dissenters from this action adopted the view espoused by the Government here. In the Fifth

Circuit, moreover, prior to the recent adoption of its local rule, it was generally recognized that an order simply granting rehearing did not operate to vacate the panel judgment. Only after the *en banc* court had considered the case and reached a decision on the merits was the panel judgment withdrawn, sometimes in its entirety and sometimes only in part. See *United States v. James,* 590 F.2d 575, 577 (5th Cir. 1979); *United States v. Geders,* 585 F.2d 1303 (5th Cir. 1978); *Weissinger v. United States,* 423 F.2d 795, 796 (5th Cir. 1970).

8. In an effort to find some kind of *en banc* action vacating the panel judgment, the Government is forced to read such action into the order granting rehearing *en banc.* But that attempt is futile by virtue of the undenied fact that a majority of the judges of the Fourth Circuit have never established any local rule or internal operating procedure of the Court which automatically accords such effect to an order granting rehearing *en banc.* Often it will defer vacating a panel decision until the *en banc* court has reheard the appeal and the majority of the active judges have determined to reach a result at variance with that of the panel. See, e.g., *Davis v. Davis,* 601 F.2d 153, 154 (4th Cir. 1979). But in the instant case, no *en banc* majority had ever entered an order or given any indication whatever that the panel opinion and judgment were deemed vacated, annulled or set aside.

9. The Fourth Circuit has discretion, of course, to adopt a local rule, by majority vote, which would provide that a vote to rehear an appeal will also be a vote to vacate the panel judgments. It cannot do so by *ad hoc* determination, however, or by some unannounced and undeclared policy. This Court declared long ago that, "It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice — whatever it may be — whereby the court convenes itself *en banc,*" and that, ". . .

(W)hatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pac. R. Corp., supra,* at 260-61, 267.

10. In this case, the failure of the Fourth Circuit to order that the panel judgment was being vacated or reversed in effect made the actual rehearing procedure an exercise in confusion. Neither the Government nor the Petitioners were advised whether the arguments before the *en banc* court should be addressed only to the limited issues decided by the panel or should recanvass the issues raised on the original appeal. Nor were the litigants ever advised as to which judgment was before the *en banc* for reconsideration — i.e., the judgment of the panel or the judgments of conviction entered by the trial court.

11. Out of this confusion emerges one decisive fact: there is nothing in the record to indicate that the panel judgment, which vacated the judgments of conviction, was ever vacated or set aside by a majority of the active judges. The undeniable fact leads to the ultimate conclusion that the judgments of conviction were never before the *en banc* court for consideration or action thereon. The majority rule embedded in the *en banc* power conferred by § 46(c) deprives an equal division of the *en banc* court of the power to effect a withdrawal of the panel judgment and of the power to act directly on the judgments of conviction absent such a withdrawal. As was said by the Florida Supreme Court in *Pitton v. Atlantic Coast Line R. Co.,* 198 So. 503, 507 (Fla. 1940), where it again dealt with an identical situation:

> . . . (A)n equal division of the appellate court on a rehearing granted as to a judgment of reversal previously rendered leaves the said judgment of reversal in force and does not result in an affirmance of the judgment in the court below, and that the

> appellate court may, under such circumstances, order that the judgment of reversal theretofore rendered shall stand unaltered by the court, being equally divided with regard to the correctness thereof and that said judgment of reversal shall be certified to the court below without opinion.

See also, *Bulluck, supra,* at 112; *Carmichael, supra,* at 66; *Samuels v. Bowers,* 232 N.C. 522, 61 S.E.2d 448 (1950); *Best & Co. v. Maxwell,* 217 N.C. 134, 6 S.E.2d 893 (1940), rev'd on other grounds, 311 U.S. 454 (1940); *Carolina Power & Light Co. v. Merrimack Mutual Fire Ins. Co.,* 240 N.C. 196, 81 S.E.2d 404 (1954).

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON ESSENTIAL ASPECTS OF THE ALLEGED MAIL FRAUD, THE ISSUE WHICH CAUSED THE *EN BANC* COURT TO DIVIDE EQUALLY, IS NOT ANSWERED BY THE GOVERNMENT.

A remarkable metamorphosis has taken place in the Government's opposition brief, pp. 23-29. The issue that the Government claimed below to be so extraordinarily important as to warrant a rehearing *en banc,* the one issue that created the deep and even division among the *en banc* Fourth Circuit judges, has now become a mere "contention" by the Petitioners that "is without merit and does not warrant further review" (Br. Opp. 24).

This issue concerns the trial court's adamant refusal to give a bribery instruction in connection with the mail fraud counts, or to instruct relative to the defense theory as to Governor Mandel's specific intent to defraud. At the trial, the prosecution steadfastly insisted that bribery was not involved in the mail fraud charges and succeeded in convincing the trial judge not to give a bribery instruction. On the appeal to the Fourth Circuit, the Government began what Judge Widener called a "complete flip-flop" (Pet. App. 10a) and an exercise in "sophistry" (Pet. App. 11a), a campaign, which it continues before this Court (Br.

Opp. 25, n.19), to convince the world that it never really abandoned the theory of the indictment that bribery was the essence of these mail fraud charges. This accounts for the Government's present argument to this Court that the trial judge need not have given a bribery instruction relative to the mail fraud counts since he did define bribery for purposes of the racketeering counts and thus it would be unnecessary "repetition" (Br. Opp. 27).

The Government does not deny that "the essence" of the mail fraud charges, as interpreted prior to trial, was that the Governor had schemed to defraud the citizens of his lawful services by accepting bribes in exchange for official action. *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976). However, the Government is uncomfortable with the fact that, at trial, it succeeded in convincing the trial judge that the mail fraud charges in this case did not concern themselves with bribery; that bribery was only mentioned in the racketeering count as an alternate means of committing the racketeering violations; and that the jury could convict the defendants of racketeering, as well as mail fraud, without any need of finding bribery.

The true substance of the instructions was understood by all of the participants at trial. It was no accident that the trial judge refused to give a bribery instruction in connection with the mail fraud charges and that the Government was able to argue to the jury that, under the court's instructions, the defendants could be convicted of all charges without any finding of bribery. The chief prosecutor, in his final address to the jury, stated that:

> The Court will charge you about the *quid pro quo* and he will tell you that you will need a specific intention to exchange a benefit for some official duty by a public official in order for there to be a bribery under the Maryland state law.

> I will not detail that. The Judge will do that. *What I want to explain to you or emphasize to you is that the whole concept of bribery is relevant only in Counts 21 and 23 [the racketeering counts] and that even as to those two counts you, in fact, can convict and should under the law convict even if you don't find those two briberies, if you find any two of the 20 mail fraud violations* (R. 1989-91). [Emphasis supplied.]

Consistent with this argument, the trial judge carefully omitted any reference to bribery as essential to the alleged scheme to defraud the State of the "loyal and faithful" services of the Governor and the concept of a scheme to defraud was defined only in the most general terms (R. 177-79).

Before this Court, the Government has simply reiterated the arguments that were rejected by the panel and by half of the *en banc* court. Such rejected arguments cannot mask the important context in which the trial court failed to give essential instructions as to the need to find bribery or actual knowledge of the identities of the owners of Marlboro. As Judge Widener noted (Pet. App. 11a-13a), this matter involves not only violations of accepted principles of proper jury instructions but seriously implicates the Petitioners' right to a fair trial. This, then, is a matter with merit that does warrant further review.

III. THIS CASE POSES SERIOUS QUESTIONS AS TO WHETHER THE "RACKETEERING" PROVISIONS OF THE ORGANIZED CRIME AND CONTROL ACT CAN BE APPLIED LITERALLY TO ANY BUSINESSMAN WHO COMMITS TWO MAIL FRAUD VIOLATIONS.

The Government concedes that the stated purpose of the Organized Crime Control Act, of which RICO is a central part, "is to eradicate organized crime" (Br. Opp. 35). It also concedes that this statute, made applicable in so many words to "any person" who engages in a pattern of

racketeering activity, "does not require proof that the defendant is connected with organized crime." (*Ibid*)

These concessions pose a classic confrontation between two opposing principles of statutory construction. Are the words "any person" to be read literally, or must they be confined to "any person" who falls within the organized crime classification discernible from the conceded legislative purpose? That question cannot be answered quickly or easily. RICO is a uniquely convoluted criminal statute. It creates no independent federal offense.[1] Rather, it imposes criminal sanctions on "any person" who is connected with a legitimate enterprise which is somehow affected by the profits or activities attributable to a prior predicate "pattern of racketeering activity."

In short, RICO "piggy backs" itself upon proof that someone has engaged in an organized or systematic pattern of two or more state or federal offenses — a pattern that Congress found to be the hallmark of organized criminal operations. Read in this legislative context, the "any person" language of RICO refers only to "any person who has engaged in an organized pattern of criminal activity." See *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892), and its progeny.

The literal construction suggested by the Government can well lead to "injustice, oppression, or an absurd consequence." *United States v. Kirby*, 7 Wall. 482, 486 (1868). As illustrated by the instant case, a literal reading means that any businessman charged with having used

[1] Compare *United States v. Culbert*, 435 U.S. 371 (1978), where the offense was accorded a literal interpretation with respect to the language that punishes "whoever" obstructs commerce by robbery, extortion or violence. It accords with common sense and fairness to read such a complete description of an independent federal offense in a literal manner, thereby covering both those who are professional racketeers and those who are not.

the mails on two or more occasions in furtherance of a single scheme to defraud, can also, without more, be charged and convicted under RICO as a racketeer. There presumably is an irrebuttable presumption that anyone charged with two or more separate criminal offenses has done what organized criminal elements so frequently do — i.e., engage in an organized pattern of criminal activity. Presumably, the "organized" activity of a businessman is generated by the "pattern" of mail fraud charges that the innovative prosecutor can so easily devise. The injustice, oppression and absurdity implicit in such a literal reading of "any person" serve as a warning against easy adoption of the literal principle in reading and applying RICO. And that fully justifies the grant of certiorari to explore the proper approach to the interpretation of this critical RICO language.

IV. THE PROFOUND CONSTITUTIONAL QUESTION POSED BY REVIVAL OF "FORFEITURE OF ESTATE" AS MANDATORY PUNISHMENT FOR THE RACKETEERING PROVISIONS WAS RAISED IN THE COURT BELOW. THE FORFEITURE PROVISION IN QUESTION IS A CRIMINAL FORFEITURE, NOT ONE *IN REM*, AND ITS ENACTMENT REPRESENTS A DEPARTURE FROM NATIONAL POLICY WHICH HAD BEEN IN EXISTENCE SINCE THE ESTABLISHMENT OF THIS NATION.

The Government in effect concedes that a RICO offense involves nothing significantly more or different in this case than the commission of two or more mailings in furtherance of a single scheme to defraud. That being true, a critical question arises as to the propriety of imposing multiple punishments for what in essence is primarily a single mail fraud offense.

1. The Government's main response to this issue (Br. Opp. 37-38) is that the Petitioners did not raise the point in the Court of Appeals and thus are barred from pursuing it before this Court. That assertion by the Government is inaccurate. At pages 29-31 of their Supplemental Brief for

Appellants on Rehearing In Banc, the Petitioners set forth in detail their contention that multiple punishments in this RICO context are impermissible both under the *Blockburger* and *Iannelli* tests. That brief and that argument were before the *en banc* Fourth Circuit when it rendered its decision affirming the judgments of conviction by an equally divided vote. And since that *en banc* court, by a majority vote, stated that it would have affirmed as against all of the contentions of the Appellants other than the issue as to which there was equal division, the Fourth Circuit must be deemed to have considered and reviewed this multiple punishments claim.

2. The Government commendably has noted (Br. Opp. 38) that this issue resembles the question currently pending for decision before this Court in *Whalen v. United States,* No. 78-5471 (argued November 27-28, 1979). Under established procedures, action on the instant petition respecting this issue should at least be deferred until the Court has resolved the question as posed in *Whalen.*

3. The Government exhibits confusion and misconception about the nature of the forfeiture dictated by § 1963 of RICO (see, Br. Opp. 39-42), but that very confusion and misconception add to the substantiality of the constitutional problems posed by this RICO revival of the outmoded concept of forfeiture of estate. The Government has created a dialogue about this constitutional matter that deserves full consideration and resolution by this Court.

The Government has consistently argued in this case that a RICO forfeiture is directed at a racketeer's interest in legitimate business enterprises "acquired or operated by racketeering methods" (Br. Opp. 40). Hence, it is said, a RICO forfeiture is identical with, or substantially like, a traditional *in rem* forfeiture of property used in the conduct of criminal enterprises, as to which there are no constitutional problems.

The Government's view of the nature of a RICO forfeiture, however, finds no support in the statutory provision, the legislative history or the judicial pronouncements dealing with RICO forfeitures. Basically, the Government suffers from a myopic view of the racketeering activities outlawed by RICO. Section 1962 of RICO does not criminalize the use of a business enterprise in the commission of any of the predicate crimes constituting a "pattern of racketeering activity." Instead, § 1962 makes it illegal to exploit the pattern of predicate crimes in such a way as to infiltrate or operate a legitimate business enterprise. The racketeer's resulting interest in the enterprise — which is the interest forfeitable under § 1963 — is the end rather than the means by which the predicate crimes have been committed.

The district court that imposed the forfeiture sanction in this case properly conceived of this sanction not as an *in rem* forfeiture of business interest used in the commission of the predicate mail fraud crimes but as a proceeding "against the defendant himself *in personam*." *United States v. Mandel*, 408 F. Supp. 679, 682 (D. Md. 1976).

The RICO forfeiture provision has consistently been treated by all but Government counsel as a criminal forfeiture of property, as a punishment directed at the convicted racketeers rather than at the property itself. Every court that has addressed the problem has concluded that a RICO forfeiture is a criminal forfeiture in the historical common law sense, one that perceives the "serious constitutional questions" alluded to in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). And every such court has noted that Congress intentionally drafted the RICO forfeiture provisions to

effect this highly questionable form of forfeiture of estate. To quote but from one of the judicial authorities cited by the Government (Br. Opp 41), *United States v. L'Hoste*, 609 F.2d 796, 813, n.15 (5th Cir. 1980),

> The forfeiture penalty incorporated in section 1963 differs from other presently existing forfeiture provisions in federal statutes. Under other statutes, the forfeiture proceeding is in rem against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting section 1963, however, Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment. *See* S. Rep. No. 91-617, 91st Cong., 1st Sess. 124-25 (1969).

See also, *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), relied upon by the Government (Br. Opp. 41-42), where the Second Circuit commented that, "RICO is apparently the first modern federal statute to impose forfeiture as a criminal sanction directly on an individual defendant" and that, "what is innovative about RICO is . . . that it imposes [forfeiture] directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture."

As these courts have recognized, Congress was fully aware and was intent on reviving "the concept of criminal forfeiture" that had been outlawed by statute (18 U.S.C. § 3563) since 1790, that no federal statute prior to RICO had "provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States," and that § 1963 of RICO therefore "would repeal 18 U.S.C. § 3563 by implication." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969).

None of the courts that have perceived the true nature of a RICO forfeiture have provided any satisfactory answers to the constitutional problems posed by the Petitioners. As RICO prosecutions proceed apace with the ever-present sanction of forfeiture of estate for those convicted as racketeers, the need for an authoritative resolution of constitutional validity of the forfeiture becomes more pressing.

V. SERIOUS QUESTIONS ARE PRESENTED BY THE LAVISH AND UNPRECEDENTED USE OF RULE 803(24), FRE, TO SUPPLY CRITICAL ELEMENTS OF A CRIMINAL CASE THROUGH HEARSAY NOT WITHIN ANY OF THE RECOGNIZED EXCEPTIONS.

It is true, as the Government states, that the residual exception of Rule 803(24), FRE, allows the introduction of hearsay declarations not within recognized exceptions if they are accompanied by "equivalent circumstantial guarantees of trustworthiness" and if the court makes the three explicit findings required by the Rule (Br. Opp. 42-43). The Government has failed to mention, however, that the trial judge admitted the questionable hearsay in the present case without making any of the findings which the Rule requires (Tr. 6235), and that, by its summary order, the *en banc* court similarly failed to make any such determination. In its solitary attempt to justify the disputed evidence, moreover, the Government misread the record, and its arguments should therefore be disregarded.

The failure to make the determinations required by Rule 803(24) should have rendered the evidence inadmissible as a matter of law. Cf. *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978). The special nature of the residual exception imposes on the courts the responsibility to be certain that it "be used very rarely and only in exceptional circumstances;" that it not be a "broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions;" and that it not be a means for

"major judicial revisions of the hearsay rule." Fed. R. Evid, Rule 803(24), Conf. Rept.; 28 U.S.C.A. Historical Note. There are added considerations in a criminal case for requiring strict adherence to the safeguards of the Rule. *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977).[2] To allow hearsay to be admitted under the residual exception without compliance with the plain dictates of the Rule is to sanction the very misuse which is to be scrupulously guarded against.

Furthermore, there is no authority for admitting the questionable hearsay in the present case. The Fourth Circuit failed to follow its own precedent, as established in *N.L.R.B. v. McClure Associates, Inc.*, 556 F.2d 725 (4th Cir. 1977), and none of the cases cited by the Government (Br. Opp. 43-46) would permit the type of hearsay involved here. See *United States v. Bailey*, 581 F.2d 341, 349 (3rd Cir. 1978). This case affords the Court the opportunity to require careful and sparing application of the residual exception and to forestall widespread disregard of evidentiary safeguards through careless use of Rule 803(24).

The Government does not deny that the hearsay testimony elicited from the State Senators hostile to Governor Mandel was the crucial evidence in connection with the charge that the Governor had performed official acts in exchange for participation in business enterprises. It was

[2] The Court noted in *Mathis* that, although Rule 803(24) was designed to encourage further development of federal evidentiary law, "Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules." The Court did not hesitate to reverse the ruling of a trial judge admitting hearsay when it was found that, "The ruling was not in harmony with the general purpose of the Federal Rules." The Court went on to declare that, "In the criminal case, let it not be forgotten that there is an added consideration to be given weight in favor of the preference for live testimony," and that, "This consideration flows from the Sixth Amendment right of confrontation." 559 F.2d at 299.

the only evidence which could be said to have supported the notion that the Governor secretly brought about the override of his own veto shortly after the other defendants had purchased Marlboro, and it was employed by the prosecution to counteract the considerable body of direct and unquestionably admissible evidence that the Governor had no part whatever in the override. This same direct evidence operated to deprive the Government's hearsay testimony of any meaningful corroboration, leading inescapably to the conclusion that the hearsay in this case was not attended by circumstantial guarantees of trustworthiness equivalent to those which attend the recognized exceptions to the hearsay rule.[3]

The contrary hearsay was elicited primarily from the Governor's most vociferous antagonists; it was attributed in large measure to unidentified declarants; and it was derived entirely from offhand remarks which were claimed to have been made in passing during the hectic and

[3] The record showed that the Governor ordinarily mounted no organized lobbying effort to sustain his vetoes, but that, notwithstanding this general policy, he instructed his chief legislative officer to inform inquiring legislators that he wanted all his vetoes, including the racetrack veto, sustained (Tr. 8295-8313). The presiding officers of both houses of the legislature testified that the veto of the racetrack bill was overridden, the same as others that day, as part of a demonstration by the legislative leadership of its independence from the Governor, not in submission to his will, and as the result of intense lobbying by legislators from the localities affected by the bill (Tr. 7746-55; 7807, 8193-97, 8219). The record also showed that the Senate gave consideration to eight vetoes of substance on the opening day of the 1972 session and that the Governor was overridden on six of them by the votes of Senators generally identified as the Governor's allies. Most of the legislators who testified at the trial, whether for the Government or the defense, had voted repeatedly to override the Governor's vetoes on the opening day of the 1972 session (Tr. 5268, 5341, 5690). The sixteen witnesses who voted to override explained that their votes were based entirely on the merits of the bill, or on its local nature, or because of the atmosphere of independence which surrounded the opening day of the 1972 session.

fast-moving events of a legislative opening day (R. 1009, 1013-14, 1108-09, 1120, 1122; Tr. 4588, 4593-95, 4883). At best, the statements amounted to nothing more than rumor and speculation, and they originated from a setting in which, as acknowledged by the Government's own witnesses, unverifiable rumor abounds (Tr. 4883).[4]

Despite the great importance that it assumed for the Government's case, the hearsay attributed to Senator Staten was so ambiguous that it was inherently lacking in trustworthiness and it could hardly have furnished a reliable basis for the jury to draw conclusions about the activities of the Governor. The evidence indicated that the comment was only made once, while Senator Staten was hurrying to the Senate chamber, and, although two Senators claimed to have heard it, they testified as to five different versions as to what they might have heard. They

[4] In some instances, as in the case of Senator Coolahan, the hearsay contradicted the public statements which had been made by the witness years earlier on the opening day of the 1972 session. Senator Coolahan was permitted to testify that he had been part of a general discussion on the floor prior to the start of the session (R. 1247). He said that he could not tell who had participated in the discussion; that it might have been those who sat near him, five of whom he named; but that "it could have been others" (R. 1249). Based on the "conversations that were going on among the Senators on the floor, none of which he could specify, Coolahan said that he had made the "observation" that "the Governor did not care whether he was overridden . . ." (R. 1249-55). Senator Lapides, a self-confessed "political enemy of the Governor," testified that he had engaged in unspecified conversations with "members of the press" and "probably . . . 50 people that particular day" (R. 1111). Lapides was allowed to state that, based on his discussions, including those with members of the press, he came to the "general feeling" or the "belief" that "the Governor wanted the veto overridden, his own veto overridden . . ." and that, "through others," the Governor was "actively seeking to have the veto overridden" (R. 1104-07). Similar testimony, not specifically described in the previous briefs, was elicited from Senators Mason (R. 1229-30, 1234), Abrams (R. 1360-63) and Thomas (R. 1168, Tr. 5250-52).

also hastened to add that they did not know if Staten was speaking for the Administration at the time (R. 1081-82), and that they did not stop to inquire whether his remark was anything more than speculation (R. 1062).[5]

We now explore the various errors which flaw the Government's argument "of ample corroboration" for the "out-of-court declarations." *First*, asserting that the Governor's legislative aides "customarily" lobbied in support of vetoes, the Government finds suspicious the "conspicuous absence of lobbying for the racetrack bill" (Br. Opp. 44). The testimony of the experienced legislators, however, including those called by the Government, was that the Governor did not ordinarily lobby to sustain his vetoes and that the racetrack bill was not of such exceptional importance as to justify departure from general practice (Tr. 5343-44, 7658, 7697, 7748-50, 7911).[6]

Second, the Government finds suspicious the fact that the racetrack bill was overridden in the Senate "by a surprisingly large majority" that included "Mandel's closest supporters." The implication of this statement is

[5] Senator Crawford, to whom the statement was allegedly made, quoted Staten, variously, as having said that the Governor "would like the veto overridden," or that the Governor "wouldn't mind having it overridden," or that the Governor "didn't care" about the veto (R. 1061, 1976-78). Senator Thomas, who claimed to have been present when Staten made his remark, testified that "Senator Staten was walking through the lounge and commented that the racing bill would be overridden, words to that effect," adding that, "I don't remember the exact words" (R. 1166). Since the remark was susceptible of so many interpretations, some innocent and others less so, and since there was no indication from the remark itself as to whether Staten was quoting the Governor or simply voicing speculation derived from any one of innumerable sources, this hearsay, on its face, was of the least reliable sort.

[6] Senator Clark, a four-term veteran of the Senate and one of the Government's principal witnesses, testified that he could not recall a specific instance when a Governor had lobbied actively for a veto to be sustained (Tr. 5343-44).

that the Senate override of the racetrack bill was a "surprising" event on the opening day of the 1972 legislative session; that the vote to override was extraordinarily large; and that, absent some prodding by the Governor, those Senators who were usually his supporters could not have been expected to have voted to override. The assertion is divorced from the realities that the Senate overrode the Governor on six of eight vetoes on the same day; that the margin of the vote on the racetrack bill was narrower than that of most of the others; that those persons identified as the Governor's supporters had voted consistently for most of the overrides; that the many overrides were due to an unusual display of independence which accompanied the opening of the 1972 session; and that, in the case of the racetrack bill, sixteen witnesses, half of them called by the Government, explained, persuasively, that their votes were brought about by factors which had nothing to do with the Governor (See p. 17 above).

Third, it is misleading to analogize the hearsay testimony to "present sense impressions" (Br. Opp. 45). The argument flies in the face of the principal limitation of present sense impression testimony, i.e., that a witness may not recount "a statement of . . . belief to prove the fact . . . believed." See, Rule 803(3), FRE. The purpose of this safeguard is to protect the factfinding process from speculation and to preserve the very integrity of the hearsay rule. 4 Weinstein, *Evidence*, ¶¶ 803(1)[1], 803(3)[05]. In this case, the Government seeks to use professions of present sense impression in a manner which is contrary to this basic limitation and for the express purpose of proving the cause of the impressions.

Fourth, the Government had stated, incorrectly, that the "availability of the declarants" was a strong indication of the reliability of the hearsay (Br. Opp. 46). The statement

overlooks the fact that the prosecutors urged the trial court to receive the hearsay precisely because many of the declarants could not be identified and because of failures of recollection among those who might have been the declarants (First Trial Tr. 3496-97). The Government notes that more than half of the surviving legislators testified in this trial (Br. Opp. 46). It fails to note further, however, that not one of these witnesses acknowledged that he was the declarant for any of the hearsay described by others, and, most significantly, that each of these witnesses explained that his own vote had been due to factors independent of the Governor and contradictory of the conclusions suggested by the hearsay (See p. 17 above).

The Government seems to argue that the best interests of the judicial process are served by allowing a federal criminal trial to be turned into a free-wheeling discussion in which the principal actors are encouraged to recount their own versions of some legislative drama. This Court should accept review of the present case to reaffirm the wisdom, expressed long ago in *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951), that, "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and [are] as readily believed," and that, "Courts are not the place for such controversies."

VI. THIS IS THE PROPER CASE FOR THE COURT TO DECIDE WHETHER THE *ALLEN* CHARGE SHOULD CONTINUE TO BE USED IN THE FEDERAL COURTS, AND, IF SO, THE FORM AND MANNER OF ITS PERMISSIBLE USE.

The Government suggests no valid reason for this Court to defer further a resolution of the uncertain status of the *Allen* charge in the federal courts. The extraordinary intensity of the jury deliberations in this case, and their almost unprecedented length, suggest strongly that this is the time and case for the propriety of the *Allen* charge to be reviewed. This case also presents the opportunity to

explore the many ramifications implicit in the giving of such a charge because of the closeness of the issues, the jury's first announcement that it was unable to find any of the defendants guilty of a scheme to defraud and the trial judge's gratuitous departure from the form of charge suggested by the ABA.

The *Allen* charge, often called the "dynamite charge," has had a controversial history ever since its rather cursory approval more than 83 years ago in *Allen v. United States,* 164 U.S. 492, 501-02 (1896). The instruction itself was only summarized "in substance" by the Court in that case, and has not since been assessed or reviewed by this Court.

The charge, with all its formulations in various lower court opinions, has been subjected to a withering barrage of attacks largely on grounds that it is coercive and inaccurate. Many courts have proscribed its use in any form. The latest count shows that three federal circuits and at least 23 state courts have totally disapproved the instruction, the disapproving Circuits being the Third, the Seventh and the District of Columbia Circuits. And the most recent state court to register a decree that an *Allen*-type instruction "should never again be read in a California courtroom" is the Supreme Court of California. *People v. Gainer,* 139 Cal. Rept. 861, 868-70, 566 P.2d 997, 1004-06 (1977).

Ever since its origin in 1896, the *Allen* charge has persisted "not so much as an object of commendation as it is a product of toleration." *United States v. Fioravanti,* 412 F.2d 407, 415 (3rd Cir. 1969), cert. den. *sub nom. Panaccione v. United States,* 396 U.S. 837 (1969). Certainly the objections raised in the *Gainer* opinion merit the final burial of the charge. And those considerations undoubtedly played a role in the recommendation of the

Judicial Conference of the United States that, as a matter of judicial policy, the *Allen* charge should no longer be given in the federal courts. See Supplement to Report of the Committee on the Operation of the Jury System, Judicial Conference of the United States 2 (1969).

At the same time, however, the Judicial Conference expressed its tolerance for the modified *Allen* charge recommended by the A.B.A. Project on Minimum Standards for Criminal Justice. While the Government seeks solace in the ABA tolerance of a modified *Allen* charge, the trial judge in the instant case plainly exceeded the carefully limited bounds of that recommended charge by gratuitously instructing the jury that the case is "an important one" to the Government and the defendants and that "its presentation to you has involved expense and expenditure of time by both the Government and the Defendants" (R. 311). He thereby committed error which should not go unnoticed and which merits careful review. *United States v. Sawyers,* 423 F.2d 1335, 1343 (4th Cir. 1970); *United States v. Stollings,* 501 F.2d 954, 956 (4th Cir. 1974).

The absence of uniformity on an important question of federal judicial administration serves the interests of no one. Until this Court acts to bring order, the present state of uncertainty will persist.

CONCLUSION

For these various reasons, supplementing those previously advanced by the Petitioners, both the Petition for Mandamus and the Petition for Certiorari should be granted.

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